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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

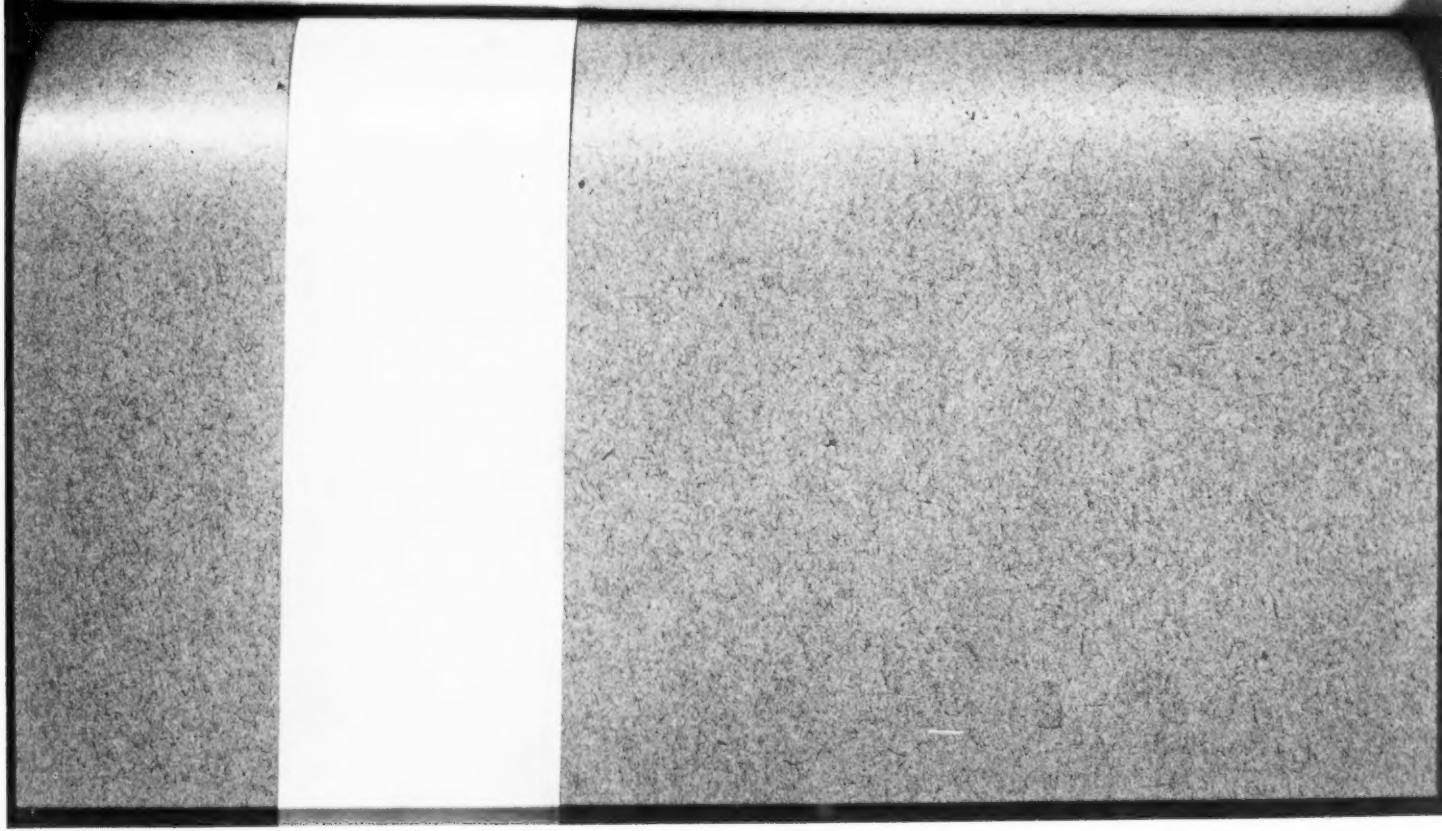
ORIGINAL No. 7[redacted]2

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

ANSWER OF WEST VIRGINIA.



IN THE SUPREME COURT OF THE UNITED STATES.

ORIGINAL NO. 7.

OCTOBER TERM, 1907.

COMMONWEALTH OF VIRGINIA
vs.
STATE OF WEST VIRGINIA.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The answer of the State of West Virginia, by William M. O. Dawson, Governor, and Clarke W. May, Attorney General, by leave of this Honorable Court, to the bill of complaint exhibited against said State of West Virginia by William A. Anderson, Attorney General, for and on behalf of the State of Virginia.

This defendant, now and at all times hereafter saving to herself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or so much thereof as this defendant is advised is material or necessary for her to make answer to, answering, says:

I

That she believes it is true as alleged that on the first day of January, 1861, plaintiff was indebted in "about" the sum of $33,000,000, upon obligations and contracts made in connection with the construction of works of internal improvement within her then territory; and it may be true that the greater part of said indebtedness was shown by her bonds and other evidences of debt, given for the large sums of money which she from time to time had borrowed and used for said purpose; and it may also be true that all her liabilities, though arising under contracts made before that date, had not then been covered by bonds issued for their payment; but as to this allegation respondent has no knowledge or information

except what is derived from said bill. This respondent denies that there was in addition to the above mentioned liability to the general public any other indebtedness evidenced by bonds held by and due to the Commissioners of the Sinking Fund and Literary Fund of the said State of Virginia as created under her laws, amounting, the former to $1,462,993, and the latter to $1,543,669.05, or to any other sums, as of the same date, as in the said bill is alleged, because this defendant avers that the commissioners of these two funds were and are mere State agencies, and public officials of the State, created by said State of Virginia to have the custody of and to preserve certain of her financial resources and obligations to be made available for specific purposes when necessary, and which now belong exclusively to Virginia and are held for her sole and exclusive use and benefit. Respondent denies that any of the bonds or certificates so alleged to be held by the Commissioners of the Sinking Fund and the Literary Fund were ever negotiated or sold by the State of Virginia, or that the same constituted a part of the public debt of that State on the first day of January, 1861, and denies that the certificates representing one-third of such bonds are now a part of the said public debt; and respondent avers that the State of Virginia has long since voluntarily canceled all of said bonds and the same are no longer of any force or validity.

II.

It is true as alleged that said portion of the territory which now constitues the present State of Virginia was, prior to January 1, 1861, devoted mainly to agriculture, and, to some extent, to grazing and manufacture, which afforded its chief source of revenue at that time; but this defendant avers that the territory which now composes the State of Virginia was largely underlaid with rich and valuable minerals only awaiting the opportunity and means of development to make the said State exceedingly wealthy in varied mineral resources such as coal, iron, manganese and other valuable and marketable products, and the said State abounded at that time in large forests of valuable timber which have since develpoed into a great source of revenue to the said State and its citizens. It is true that the portion included in what now constitutes the State of West Virginia had vast potentialities of wealth and revenue in undeveloped stores of mineral and timber, and respondent avers that the same was inaccessible and of very little value on the first day

of January, 1861, and during all the years prior thereto, and that it has been only within recent years that the development of said resources has been begun in the said State of West Virginia, and this required the outlay of many millions of dollars, since January 1, 1861, in the construction of railroads and other public works and the appropriation by the Congress of the United States of many more millions of dollars for the improvement of her waterways in order to afford an outlet for her mineral and other products. This respondent denies that the prime object of the State of Virginia in entering upon a system of internal improvement was to hasten and facilitate the development of the resources of wealth and revenue in West Virginia by the construction of graded roads, bridges, canals and railways extending through the then State of Virginia from tidewater toward the Ohio river, and avers that the main object of said system of internal improvements was to afford the eastern part of the State an outlet for its own products to the Ohio river on the west and to the seaboard on the east, and to afford convenient communication with those points so as to create a market for such products at points on the eastern coast of Virginia at tidewater, and thus open up and develop the resources of the territory now constituting the State of Virginia, and not, as alleged in said bill, for the purposes of developing the resources of the western part of her territory, now constituting the State of West Virginia. This respondent further says that it is true as alleged in said bill that the larger portion of these public works was constructed east of the Appalachian range of mountains and within the present territorial limits of Virginia, and respondent avers that nearly all of the money derived from the sale of the bonds was in fact expended in the development and improvement of what now constitutes Virginia, and only a comparatively small sum was expended in developing and improving the portion now composing West Virginia; that these expenditures in Virginia were of very little practical benefit to the people living in the westren part of the State up to and including the first day of January, 1861. This respondent further says that it is true that property values within the limits of West Virginia have been largely increased since 1861, but denies that such increase was caused by the improvements made within her present territory prior to 1861, but nearly all of the improvements and developments of resources in said State have been made within the last twenty-five years and are due to railroads and other public works constructed by her own people and by private capital

brought within her territory and by appropriations made by Congress, and are almost entirely disconnected and independent of any expenditures made by Virginia prior to January 1, 1861, either by the proceeds of bonds issued and sold by her or from any other means derived from the creation of any debt by her. Respondent admits that the money appropriated and the payment of the annually accruing interest on said debt prior to January 1, 1861, and to the formation of the Sinking Fund for the ultimate redemption thereof was derived from taxes imposed upon property subject to taxation throughout the entire state, but respondent avers that the large amount thus derived from taxation to which the present State of West Virginia, then a part of Virginia, contributed her full share, was not kept intact by the State of Virginia after her ordinance of secession from the union in the year 1861, but was used by her in the administration of the so-called State Government at Richmond and for many other purposes while she claimed to be a part of the Confederate States of America, and that the part of the Sinking Fund so expended should be accounted for to this State and constitute a credit to her in the settlement of her equitable proportion of said debt; this respondent calls upon the State of Virginia to show what the aggregate amount of said Sinking Fund was on the first day of January, 1861, and of what it consisted, together with the interest thereon since accruing, and that she shall be required to give credit to this respondent for the amount contributed thereto by her prior to January, 1861, in case this court shall determine that an accounting shall be had between the said States in this action.

III.

This respondent denies that the Commonwealth of Virginia was induced to enter upon the construction of her general system of improvement, in a very large measure, for the purpose of developing the aforesaid resources of the western portion of the State, now constituting the State of West Virginia, and thereby as alleged in said bill, ameliorating the condition of her citizens residing therein, and denies that it was with this view that she took upon herself the alleged burden of her puble debt, for which her bonds were issued, without which debt, it is alleged, said improvements could not have been undertaken. The respondent avers that Virginia appropriated to her own use, within the territory now constituting the

present State of Virginia, about nine-tenths of all the money derived from the proceeds of said bonds, and that this large part of said proceeds enured to the sole benefit of the people living in what now constitutes the State of Virginia, while the territory now constituting the State of West Virginia received but a small proportional part thereof, and that all the money appropriated was expended under and by direction of the officers of the State of Virginia who were elected and controlled by the voters then living withing the present limits of that State.

It may be true that a majority of the representatives residing in that part of Virginia now composing the State of West Virginia voted for the appropriations for the said public improvements, but if so, it was with the expectation and belief that an equitable proportion theerof would be expended in their section of the State which, as hereinbefore averred, was not done; and at the times when said debt was created the Legislature was in the absolute control of the very large majority of members chosen by the people living within what now constitutes the State of Virginia and they could, and actually did, control the legislation of the State.

IV.

It may be true that the development of this system of public improvements was, from its character and extent, progressive, as is alleged, and that the same extended with the general growth and increasing needs of the State, and was incomplete in 1861; but this respondent denies that prior to that time a very considerable portion of such improvements had been constructed in the territory now constituting West Virginia in order to meet the needs of the people of that portion of the State for their local purposes. On the contrary, the principal object of the State in entering upon this system was for the construction of a canal from the James River to the Ohio River for the purpose of connecting the Virginia seaboard with the western waters, the building of certain railroads projected in the same direction and in certain other directions, all within the present territorial limits of the State of Virginia, and for the construction of highways and bridges and certain public buildings, nearly all of which were located and constructed within the present limits of the State of Virginia. It is true, as alleged, that the expenditures of this money were under the direction and control of the Board of Public Works, the members of which were elected by

the voters of the State at large, but respondent avers that this Board of Public Works was at all times composed of a majority of members residing within the present limits of Virginia and that only such members were chosen as were acceptable to the people residing within the present limits of Virgina and to promote their views and interests as to the method and policy of the expenditures of said moneys.

V.

It is true that on the 17th day of April, 1861, the people of Virginia in general convention assembled adopted an ordinance by which it was intended to withdraw Virginia from the union of the States, and it is also true that a considerable portion of the people of Virginia dissented from this action and that a great majority of the people residing in the territory now composing the State of West Virginia opposed the action thus taken by the people of Virginia then residing within the present territorial limits of that State, and representatives of the people organized a separate governmnt within the territorial limits of Virginia, known and recognized by the people now living within the State of Virginia as the "Restored State of Virginia;" and this government was thereafter recognized by the executive and all the other departments of the United States Government and treated as the State of Virginia until long after the close of the Civil War.

VI.

It is also true that on the 20th day of August, 1861, the State of Virginia, in a convention assembled at the city of Wheeling, adopted an ordinance "to provide for the formation of a new state out of a portion of the territory of this State," and that section nine of said ordinance is in the following words:

> "The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government, since any part of said debt was contracted; and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during the same period. All private right and interests in lands within the proposed State de-

rived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia."

Section ten of said ordinance provided as follows:

"When the General Assembly shall give its consent to the formation of such new State, it shall forward to the Congress of the United States such consent, together with an official copy of such constitution, with the request that the said new state may be admitted into the Union of States."

The same ordinance also provided for a convention of the people to be held within the territorial limits of the then State of Virginia by representatives to be selected by a popular vote of the people within the limits of the proposed new State to adopt a constitution for such proposed new State, and the said convention assembled at Wheeling in November, 1861, and framed a constitution which was thereafter duly ratified by a vote of the people, which constitution contained the following provision relating to the public debt of the State of Virginia:

"An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."

Subsequently, on the 13th day of May, 1862, an act was passed by the legislature of Virginia giving the consent of that State to the formation and erection of the proposed new State within the jurisdiction and territorial limits of said State of Virginia. Section one of this act provided as follows:

"That the consent of the Legislature of Virginia be, and the same is hereby, given to the formation and erection of the State of West Virginia within the jurisdiction of this State, to include the counties of Hancock, Brooke, Ohio (and many other counties) according to the boundaries and under the provisions set forth in the Constitution of the said State of West Virginia and the schedule thereto annexed, proposed by the convention which assembled at Wheeling on the 26th day of November, 1861."

Section three of said act provided:

"Be it further enacted, That this act shall be transmitted by the executive to the senators and representatives of this Commonwealth in congress, together with a certified original

of the said constitution and schedule, and the said senators and representatives are hereby requested to use their endeavors to obtain the consent of congress to the admission of the State of West Virginia into the union."

The respondent avers that said act was transmitted to the senators and representatives of Virginia in Congress. A correct copy of the same is attached to this answer and made part hereof as "Exhibit No. 1."

VII.

This respondent further says that the allegations contained in Paragraph VII of said bill with reference to the act of Congress and the admission of the State of West Virginia into the Union are true.

VIII.

This respondent for further answer to said bill says it is true that pending the admission of the State of West Virginia into the Union the general assembly of the commonwealth of Virginia passed the act of February 3, 1863, which is set forth in Paragraph VIII of said bill; but this respondent denies that the property which was by this act appropriated and transferred from the commonwealth of Virginia to the State of West Virginia amounted in the aggregate to several millions of dollars on the 3d day of February, 1863, as in said bill is alleged, and denies that the State of West Virginia realized and received into her treasury from the sale of bank stock alone about $600,000 as is in said bill alleged.

Respondent denies that she is chargeable for or on account of the transfer of said property, except the stocks of companies or corporations and the credits, or for any part thereof, otherwise than in a settlement with the State of Virginia for this respondent's just proportion of the public debt of that State as provided in the said ordinance of August 20, 1861, and in the said act of February 3, 1863; and respondent avers that she is not chargeable in any settlement for or on account of such stocks or credits with any sum in excess of the actual market value of the same at the times when they were transferred to her; and she avers that at the times when such stocks and credits were transferred they were greatly depreciated and were of but little value.

IX.

Respondent admits the passage of the act of February 4, 1863, as alleged in Paragraph IX of said bill, but denies that she received, or that it was intended by said act that she should receive, any money except such as had then been collected, or might be thereafter collected, within the territory constituting the present State of West Virginia prior to the admission of the State into the Union, and she denies that she is legally or equitably liable to the plaintiffs for any part thereof, or that said act of the Legislature imposed, or purported to impose, any liability upon her or was so intended or understood. Respondent avers that after the Wheeling Convention and the passage of the ordinance providing for the formation of a new State, the Restored State of Virginia continued to impose and collect taxes in the territory now composing the State of West Virginia until the admission of that State into the Union, and a small part of the money realized by such taxation was returned to the new State under the said act of February 4, 1863, and no other money was appropriated or received under that act.

Respondent avers that nearly the entire amount of revenue collected by the "Restored State of Virginia," prior to the admission of West Virginia into the Union was collected from the counties now constituting the latter State, and that much the largest part of it was expended by the said state government outside of those counties, and that it was only just and equitable that such surplus as might remain at the time of admission into the Union should be restored to her in order that she might be able to install her government, establish courts and preserve order within her limits; and this just and equitable claim was recognized by Virginia when the said act was passed.

X.

This respondent, for further answer to said bill, says that it is true that the Constitution of the State of West Virginia contained the provision, among others, set forth and alleged in Paragraph X of said bill, but this respondent denies that the terms "public debt" or "previous liability" referred to either the property or money formerly belonging to the State of Virginia which had been transferred to and received by West Virginia under the acts of the general assembly of the commonwealth of Virginia set forth

in Paragraph VIII and Paragraph IX of said bill, for the reason that said constitution was adopted long before the said acts of the general assembly of Virginia were passed, and before the act passed in May, 1862, by the said general assembly of Virginia giving her consent to the formation of the proposed new State out of the territory within her limits. This respondent therefore denies that anything contained in sections 5, 7, or 8 of Article VIII of the Constitution of West Virginia, adopted in 1861, bears any such construction, or is susceptible of any such meaning, as is given thereto by the allegations contained in Paragraph X of plaintiff's said bill.

XI

This respondent for further answer to said bill says that she denies that the commonwealth of Virginia made attempts at different times to ascertain and settle the equitable proportion of her public debt to be borne by West Virginia, upon the terms and in the manner contemplated by section nine of the ordinance adopted by the convention of the State of Virginia on the 20th day of August, 1861, and section eight of Article VIII of the Constitution of West Virginia, or in the manner prescribed by either of said instruments. The facts relating to the efforts of the Commonwealth of Virginia and the State of West Virginia to make an adjustment of the liability of the latter State, if any such liability exists, between the year 1865, when communication between the two States was re-established, and the year 1872, are as follows:

Prior to December, 1866, the Commonwealth of Virginia instituted a suit in equity against the State of West Virginia in this Honorable Court for a decision of the question whether or not the counties of Berkeley and Jefferson constituted a part of the State of West Virginia. This cause was not determined until the 6th day of March, 1871, on which day it was decided in favor of West Virginia. The effect of the pendency of this suit for over four years was to prevent a satisfactory adjustment of West Virginia's liability for the payment of an equitable proportion of the public debt of Virginia as provided in said ordinance of the Wheeling Convention because of the fact that West Virginia's boundaries could not be known and therefore it could not be determined what amount of money had been expended

within her limits for public works or other purposes prior to the 1st day of January, 1861.

Respondent avers that the Governor of West Virginia in his message to the legislature in January, 1866, recommended that Commissioners be appointed to settle with the commonwealth of Virginia respecting the said public debt; but no action was taken by the legislature of West Virginia of 1866 for the reason that the authorities of Virginia had made, at that time, no provision for a settlement, so far as was known to the authorities of West Virginia.

In his message to the legislature of West Virginia in 1867, the Governor again directed the attention of that body to the subject of the adjustment of the said public debt, stating that he was informed that Honorable Alexander H. H. Stuart of Virginia, together with two others, had been appointed under a resolution adopted by the General Assembly of Virginia: First for the purpose of securing a reunion of the two States, or secondly, for the purpose of adjusting the public debt and for a fair division of the public property. On the 28th day of February of the same year, the legislature of West Virginia by resolution declared that the people of that State were unalterably opposed to a reunion with the people of the commonwealth of Virginia, but expressed the willingness of the citizens of West Virginia to effect a prompt and equitable settlement between the States and directed the Governor as soon as the said suit in the Supreme Court of the United States, relating to the counties of Berkeley and Jefferson, had been disposed of, to appoint three commissioners on the part of West Virginia to treat with the commissioners of Virginia upon the matter of adjusting the public debt of that State as provided in the ordinance of 1861, and the Constitution of West Virginia, adopted by the convention which assembled in November, 1861, and also requiring a report of their action to the Governor in order that the same might be communicated to the legislature of West Virginia for its action.

In January, 1868, the Governor of West Virginia informed the legislature in his annual message that the commissioners had not been appointed under the resolution because the suit in relation to the counties of Berkeley and Jefferson had not been disposed of. But in February of that year the Committee on Claims and Grievances of the House of Delegates, upon the petition of one of Virginia's creditors asking that the State of West Virginia provide for

the payment of certain bonds of the State of Virginia of which he claimed to be the bona fide holder, reported that the settlement of West Virginia should be with the State of Virginia and not with the creditors of Virginia. And again in his message of 1869 to the Legislature of West Virginia the governor referred to the subject of the settlement of the public debt of Virginia and stated that commissioners had not been appointed by him up to that time owing to the fact that the suit between the States was still pending. The State of Virginia having, by an act approved February 18, 1870, provided for the appointment of three commissioners to treat with the authorities of the State of West Virginia, the governor of West Virginia, by communication dated February 24, 1870, advised the Legislature of West Virginia of the passage of that act by Virginia, and thereupon the Legislature of West Virginia, on the 1st day of March, 1870, appointed a joint committee of the two Houses of the Legislature to confer with the Virginia Commissioners and report to the Legislature, provided, however, that such appointment of commissioners should not in any manner prejudice the rights of West Virginia involved in the suit in equity brought against her by the commonwealth of Virginia as hereinbefore stated, which was still pending in this court.

Afterwards, on March 3, 1870, the governor of West Virginia was authorized by the Legislature to appoint three resident citizens of the state to treat with the authorities of the Commonwealth of Virginia upon the subject of the proper adjustment of the public debt of that State, but it was provided that nothing in that action was to be construed as impairing the jurisdiction of West Virginia over the counties of Berkeley and Jefferson; but as there was an omission to make an appropriation to pay the expenses of West Virginia's commissioners, and the resolution authorizing their appointment was passed on the last day of the session of the Legislature, the Governor of West Virginia again in his message of 1871 stated that no appointment had been made owing to the lack of funds to pay the expenses of such commission.

Pending the efforts thus being made on the part of West Virginia, the general assembly of Virginia, on February 20, 1871, through the Governor of that State, tendered to West Virginia a proposition for an arbitration of the question relating to the public debt of that State, the arbitrators not to be citizens of either State, each State to appoint two arbitrators and the two to select an umpire if deemed necessary. This proposal made by the Common-

wealth of Virginia was submitted to the Legislature of West Virginia on the 17th day of February, 1871, but on the 15th day of February, 1871, two days prior to the communication of this action of the General Assembly of Virginia, the Legislature of West Virginia had passed a joint resolution authorizing the Governor to appoint three disinterested citizens of the State to treat with the authorities of the Commonwealth of Virginia upon the subject of the adjustment of the public debt of that State existing prior to the 1st day of January, 1861, to report on various matters relating to the creation of the debt; upon the investments held by the State of Virginia, and, providing, among other things, compensation for the commissioners and for the employment of an accountant or clerk.

The proposal of Virginia relating to arbitration was referred by the Legislature of West Virginia to a joint special committee of the two Houses, which committee reported a preamble and joint resolution rejecting the tender of arbitration made by the Governor of Virginia because the adjustment of the debt should be subject to the ratification of the legislatures of the two States and because citizen commissioners from both States would be necessarily more familiar with the circumstances attending the creation of the said debt and other questions connected therewith. The said joint resolution also invited the Commonwealth of Virginia to appoint three disinterested citizens of that State as commissioners, with authority to treat with the commissioners, theretofore authorized upon the part of West Virginia; but it was provided that their report should be subject to the approval and ratification of the legislature of the State of West Virginia and the General Assembly of the Commonwealth of Virginia; and the Governor of West Virginia was also directed by said resolution to communicate to the Governor of Virginia, without delay, certified copies of the preamble and resolution. Accordingly, in pursuance of this resolution, the Governor of West Virginia appointed three commissioners to negotiate with the State of Virginia for a settlement of West Virginia's equitable part of the public debt. After their appointment the said commissioners proceeded to Richmond, where all the accounts, vouchers and other evidences of the receipt and expenditure of the money were kept, and there spent some time in the examination of such documents as were accessible, but realizing the necessity for further and more accurate information than they could obtain unassisted, they addressed a communication to the second auditor of the Com-

monwealth of Virginia soliciting specifically the necessary information. To this request on the part of the Commissioners of West Virginia, the said second auditor made a reply in which he declined to furnish the information desired, a copy of which reply is herewith filed as "Exhibit No. 2" and made a part of this answer.

The failure and refusal of Virginia to co-operate with the said commissioners placed them at a great disadvantage in the examination of the records at Richmond, and they therefore obtained only such facts and figures as to enable them to make an imperfect report to the Governor of the State of West Virginia with reference to said public debt, showing the part of said public debt for which, in their opinion, according to such information as they could procure, West Virginia was liable.

Respondent avers that by reason of the inability of said commissioners to procure from the State of Virginia the necessary information concerning the public debt and other matters connected therewith, their report was not only very incomplete and inaccurate, but it appeared therefrom, that in making their investigations they wholly disregarded the provisions of the ordinance of the Wheeling Convention adopted August 20, 1861, and did not follow the method of settlement therein prescribed and respondent avers that for these and other reasons the conclusions of said commissioners were not agreed to or accepted by the Legislature of West Virginia; but subsequently the Senate of West Virginia proceeded to make an investigation of the subject through its Finance Committee, of which J. M. Bennett, who was for eight years auditor of the old State of Virginia, and whose time expired when the city of Richmond was evacuated in 1865, was chairman. Said committee made a report on the 22nd day of December, 1873, from which it appeared that the State of West Virginia upon a settlement with the Commonwealth of Virginia based upon the provisions of section nine of the ordinance passed by the commonwealth of Virginia at the Wheeling Convention, did not owe to the said Commonwealth of Virginia anything whatever, but that, on the contrary, the said Commonwealth was indebted to West Virginia on account of said debt on the 1st day of January, 1861, in the sum of $512,000, not including interest. A copy of said report is filed herewith, and made a part hereof as Exhibit 3.

The State of West Virginia has never receded from the provisions contained in section nine of the Wheeling Ordinance with

reference to the settlement of this respondent's just proportion of the public debt of Virginia, but has uniformly adhered thereto throughout her history as a State; and the resolutions adopted by her Legislature in recent years in which she declared that she did not owe the State of Virginia anything on account of said public debt were based upon the said report of the Senate Committee made in 1873 as aforesaid, and upon Virginia's persistent refusal to recognize the basis of settlement provided for in said ordinance as the just and true one upon which a settlement between the two States could legally and equitably be made.

After the proposition of the Commonwealth of Virginia to select arbitrators, which was declined by the State of West Virginia as hereinbefore stated the said Commonwealth of Virginia at no time signified her desire to settle with West Virginia the matters relating to West Virginia's proportion of said public debt until the adoption of a joint resolution approved March 6, 1894, after she had compromised and settled with her creditors and been released from all liability, which resolution provided for the appointment of a commission of seven members who were thereby authorized and directed to negotiate with the State of West Virginia for a settlement and adjustment of the latter State's part of the public debt proper to be borne by her, but which also expressly provided that such commission should not proceed with such negotiations until assurances should be received from the holders of a majority in amount of the certificates issued by Virginia under the acts hereinafter referred to, that they desired the said commission to enter into and undertake such negotiations and would accept the amount so ascertained to be paid by the State of West Virginia in full settlement of the one-third of the debt of the original State which had not been assumed by the State of Virginia; and it was also provided in said resolution that in no event should said commission enter into negotiations except upon the basis that Virginia was bound only for the two-thirds of the debt of the original State and which, as recited in said resolution she had already provided for as her equitable proportion thereof. Under the aforesaid resolution no negotiations were proposed to West Virginia until the year 1895 and then only upon the conditions prescribed in the joint resolution of 1894, which has never yet been repealed or modified in this respect; and negotiations were again offered by Virginia in 1906 but upon the same condition, that West Virginia should enter upon such negotiations with the admission on her part that the said Commonwealth of Virginia

should only be liable for two-thirds of said debt, which was again declined by the said State of West Virginia.

XII.

This respondent further answering the said bill, says that the efforts looking to a settlement, and the only efforts looking to a settlement, are those hereinbefore stated in paragraph XI in this answer; the said commonwealth of Virginia having declined in 1871 to appoint any commissioners empowered and authorized to adjust or confer with the commissioners appointed by the State of West Virginia to adjust and determine what was the proportion of the public debt of said commonwealth to be assumed by this respondent. But, on the contrary, the said State of Virginia in 1871,assumed the right hereslf to settle the said public debt, created prior to January 1, 1861, with her creditors and for that purpose, without advising or consulting with West Virginia, passed an act, approved March 30, 1871, whereby she repudiated the ordinance of the Wheeling convention and adopted a method of her own as a basis of settlement and set apart as her own just proportion of said public debt two-thirds thereof, providing for its adjustment and funding as in the said act is set forth; a copy of which is filed with said bill as exhibit No. 1.

XIII.

This respondent further answering said bill, says that any burden that the commonwealth of Virginia assumed with reference to the payment of said debts, was made upon the assumption that she owed only two-thirds thereof and which she thereby admitted was not more than her just proportion; and therefore whatever she has paid on account thereof is a matter that cannot affect any controversy involved in this suit and is a matter of which the commonwealth of Virginia cannot complain. It is true, as alleged in said bill, that the great mass of creditors of the commonwealth of Virginia have agreed to accept the certificates issued under the acts of 1871, 1879, 1882 and 1892, for the one-third of her public debt, created prior to January 1, 1861, and have likewise agreed to accept the adjudication of this court what ever it may be, in full discharge of all their claims against Virginia on account of the old bonds and their claims represented by said certificates, thus reliev-

ing said commonwealth from any further liability as to said one-third of the public debt, or any part thereof, and this was the effect which the commonwealth of Virginia and the creditors intended and understood that the act of March 30, 1871, should have as to all the certificates issued under that act.

XIV

This respondent for further answer to said bill, and especially that part contained in paragraph XIV, says that the old bonds were all required by the acts of the Legislature to be surrendered by the holders thereof to the State of Virginia and canceled, and they were all surrendered and canceled and new bonds were issued in lieu thereof for two-thirds of the said debt, not including interest, and certificates were issued for the other one-third; and it was declared by Virginia in the acts authorizing the issues and in the certificates that they were to be paid by West Virginia; and respondent avers that the said commonwealth of Virginia now holds said certificates in trust only for the owners thereof.

This respondent denies that Virginia used any means for an amicable settlement of said debt with West Virginia, or made any overtures to that end which were repeatedly refused, as alleged in said bill, except as hereinbefore stated in paragraph XI of this answer.

XV.

This respondent, for further answer to said bill, avers that even if all the bonds and obligations and other evidences of indebtedness of the original State of Virginia outstanding or contracted before January 1, 1861, as stated in paragraph I of said bill, except a comparatively insignificant sum, not amounting to one percentum of this liability, have been taken up and are now actually held by the commonwealth of Virginia, this fact does not give to the plaintiff the right to call upon West Virginia for settlement with respect thereto, because this respondent avers that the said bonds and obligations and other evidences of public indebtedness of the commonwealth of Virginia, contracted prior to January, 1861, have been taken up by the issuance of other bonds in lieu of two-thirds thereof, as before stated, and by the issuance of the certificates hereinbefore mentioned for the other one-third thereof, the said one-third

to be paid by West Virginia, according to the plan of funding the said debt by said commonwealth of Virginia, and that all the said original bonds and obligations and other evidences of said indebtedness are without any force, effect or value and have been canceled and annulled as aforesaid. Respondent avers that whatever has been paid upon said old indebtedness, by Virginia, if anything, was paid only on account of her own separate and equitable proportion thereof as recognized and declared by herself; and this respondent denies that the commonwealth of Virginia has any claim either in law or equity for any accounting with reference to said bonds or certificates or other evidences of indebtedness mentioned in paragraph XV of said bill or any part thereof. Respondent avers that the plaintiff does not allege or admit in said bill, nor does it appear thereby, that she is liable on account of the other one-third or for any part thereof, which is represented, as before alleged, by said certificates.

XVI

For further answer to said bill respondent avers that if any sum has been paid by Virginia, even though amounting in the aggregate to $25,000,000, including principal and interest to date, calculated at the rate of 6 per centum per annum, it was paid by her on account of her admitted just and equitable proportion of said public debt created prior to January 1, 1861; and if she has any claim at all against West Virginia on account of said alleged payment, which is not admitted, but is denied, it can only be for such amount as may be ascertained upon the basis and according to the principles embodied in section 9 of the ordinance of the Virginia convention, as hereinbefore stated. So this respondent denies that she is liable for any part of the obligations mentioned in paragraph XV and paragraph XVI of the plaintiff's bill, alleged to have been taken up and paid on account of said public debt, and denies that the said commonwealth of Virginia has, in her own right, a "just claim" against West Virginia for contribution on account thereof.

Respondent, for further answer to said paragraph XVI of said bill, avers that all accounts, vouchers and other records relating to the said public debt of Virginia, showing the payments made thereon, if any, and all other facts connected therewith, are now and always have been in the exclusive possession and control of the plaintiff, and respondent has no knowledge or information con-

cerning the alleged payment of $25,000,000, or any other sum, on account of said debt existing prior to January 1, 1861, and therefore denies that plaintiff has paid said sum of $25,000,000 or any part thereof, and demands strict proof.

XVII

This respondent, for answer to paragraph XVII of said bill, avers that the matters therein contained do not relate to the public debt of Virginia within the meaning and contemplation of section 9 of the Virginia ordinance of August 20, 1861, and cannot be brought into this suit for adjudication and determination. This respondent denies any and all liability for or on account of the matters referred to in said paragraph and avers that the said allegations are so uncertain, general and indefinite that respondent cannot answer them specifically and that no claim against this respondent can be founded upon them in this action.

XVIII.

This respondent, for further answer to said bill says that she denies that the alleged liability of the State of West Virginia for a just and equitable proportion of the public debt of the commonwealth of Virginia rests upon any of the grounds specified in paragraph XVIII of said bill except the second, upon which, as hereinbefore averred in this answer, the State of West Virginia has always been ready and willing, and is now ready and willing, to adjust her liability, and upon which she proposed adjustment from 1866 to 1873, at which time Virginia had clearly evinced by her legislative action with reference to her public debt, her intention not to observe or abide by section 9 of the ordinance adopted by the Wheeling convention, and actually repudiated the agreed method upon which a settlement between the States should be made.

XIX.

This respondent, for further answer to said bill, avers that the only acts of Virginia indicating a desire to treat with West Virginia with reference to said public debt was that in which she tendered a proposition to arbitrate the same, thereby proposing to ignore the mode of settlement provided in said ordinance, and the

two subsequent ones whereby she declared the only conditions upon which she would negotiate with the said State of West Virginia was that West Virginia should admit that the said Commonwealth of Virginia was only liable for two-thirds of the said public debt; and this respondent avers that if it is intended by paragraph XIX of said bill to aver that plaintiff ever attempted an amicable negotiation with West Virginia, except the ones hereinbefore stated, then this respondent denies the allegations contained in said paragraph of the bill and calls for proof thereof.

XX.

This respondent, for further answer to said bill, avers that what has already been stated in paragraph XIX of this answer is also applicable to paragraph XX of said bill and is hereby adopted as part hereof; and respondent avers in addition thereto that the alleged attempts of said commission to negotiate with West Virginia with reference to the said public debt related solely to the certificates owned by third parties and held in trust by said commission and the State of Virginia, which certificates represented about all, or practically all, of the one-third of the public debt not including interest of that State created prior to January 1, 1861; and these efforts on the part of said commission to negotiate were upon the expressed condition that this respondent should concede that the Commonwealth of Virginia was, and is, liable for two thirds of the said public debt, and no more, which proffered negotiations were declined by the State of West Virginia because the finance committee of one branch of her legislative body had ascertained and reported that there was no liability upon her part to the Commonwealth of Virginia on account of the said public debt under the ordinance of the Wheeling Convention, and this respondent now denies that she owes or will owe any sum whatever to the State of Virginia upon a settlement made in the mode provided in said ordinance.

For further answer respondent says that the ordinance adopted by the Wheeling Convention in August, 1861, providing for the formation of the new State out of a part of the territory of the Commonwealth of Virginia, defined the manner in which the respondent's equitable proportion of the public debt of Virginia should be ascertained, as appears from section nine of the said ordinance, which is set out in paragraph VI of the plaintiff's bill, and is heretofore referred to and made part of this answer.

And the said Commonwealth of Virginia also provided by section 10 of said ordinance as follows:

> "When the General Assembly shall give its consent to the formation of such new state, it shall forward to the Congress of the United States such consent, together with an official copy of such Constitution, with the request that the said new state may be admitted into the Union of States."

And respondent avers that the General Assembly referred to in section ten was the General Assembly of the Commonwealth of Virginia and the constitution referred to in said section was the constitution to be thereafter adopted by the proposed new state.

The said ordinance as heretofore stated also provided for the holding of a convention by the citizens within the territory of the proposed new state for the purpose of framing a constitution. After the promulgation of the ordinance of the convention, the people of Virginia, as well those residing in that part of the territory to be converted into a new state as those residing in the other part of the Commonwealth of Virginia, which constitutes the present territory of that State, were fully advised as to the provisions of the said ordinance defining the manner in which the equitable proportion of the said debt was to be ascertained, and when the Constitution of West Virginia was framed and adopted in the year 1861 the said section nine was in full force, and both the Commonwealth of Virginia and the citizens residing in that portion thereof out of which the proposed new state was to be formed were satisfied with the methods therein provided for ascertaining this respondent's equitable proportion of the said public debt, and the constitution was framed and adopted, and West Virginia's equitable proportion of said public debt was assumed on the basis of the said ordinance, and not otherwise. It was provided in section eight, Article VIII, of the Constitution of the State of West Virginia:

> "An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."

After the adoption of this Constitution the Commonwealth of Virginia, on May 13, 1862, as hereinbefore stated, by an act of her Legislature, gave her consent to the formation of the new state, "According to the boundaries and under the provisions set forth

in the Constitution for the said state of West Virginia, and the schedule thereto annexed, proposed by the Convention which assembled at Wheeling on the 26th day of November, 1861."

Subsequently, by an act of Congress approved December 31, 1862, provision was made for the admission of West Virginia into the Union, the said act providing a change in the seventh section of the eleventh article of the constitution of the said new state, relating to slavery, and providing for a vote to be taken relative thereto, and the proclamation thereof by the President of the United States, under which West Virginia, on the 20th day of June, 1863, became one of the states of the Union.

And so this respondent is advised, and now avers, that when West Virginia framed her constitution and inserted in it the provision concerning the adjustment of the public debt of Virginia, and the Commonwealth of Virginia, through her Legislature, by the act aforesaid, approved the constitution of West Virginia as the basis of her consent for the formation of that State and her admission into the Union, and upon the passage of the act Congress admitting the said state into the Union, a compact between the two states prescribing the manner in which this respondent's equitable proportion of the debt should be ascertained was concluded and it became, and is binding upon the Commonwealth of Virginia and the State of West Virginia.

The respondent avers that her equitable proportion of said debt cannot be otherwise ascertained or determined than by the action of the State of West Virginia through her Legislature, as provided by her constitution, nor can its liquidation be otherwise provided for than by a sinking fund of sufficient amount to pay the accrued interest and redeem the principal of whatever sum may be thus ascertained within the period of thirty-four years as likewise therein provided. Respondent therefore pleads and relies upon said compact in bar of the plaintiff's right to prosecute and maintain this suit in this Honorable Court and prays that the said bill may be dismissed.

XXII.

This respondent further answering and as a defense to said bill avers that the Commonwealth of Virginia, by her said bill and exhibits therewith filed and made part thereof, shows that she has adjusted before the institution of this suit to the entire satisfaction of her people and her creditors her alleged equitable pro-

portion of her whole public debt existing on the 1st day of January, 1861, which she claims is only two-thirds thereof, and that therefore this respondent should be made liable for the other one-third thereof. In effecting this adjustment she refunded all the evidences of indebtedness created prior to January 1, 1861, except about one per centum thereof, and required the same to be surrendered to her and cancelled and annulled. Respondent avers that the said Commonwealth of Virginia did not refund two-thirds of her public debt, as alleged, in said bill although she proposed to do this by an act of her Assembly approved March 30, 1871; but finding that she could probably secure more favorable terms of settlement of what she decided to be her just proportion, another act was passed by her General Assembly which was approved March 28, 1879, whereby the debt was divided into two classes as shown by said act and thereby made a further reduction in the principal of her indebtedness, as well as securing a lower rate of interest to be paid thereon.

After various efforts to adjust the indebtedness on terms most favorable to herself, she secured a settlement whereby she funded and settled what she claimed to be her equitable proportion of her debt at a fraction less than forty-seven per cent upon the entire amount, including interest, a part of which she may have paid, but for the great volume of which she has issued her bonds, and which are now outstanding and unpaid. For one-third of her original indebtedness, created prior to January 1, 1861, she has issued certificates amounting in the aggregate to $18,227,153.60, of which it is alleged her Commissioners of The Sinking Fund and the Literary Fund hold $2,745,462.69, leaving $15,281,970 in the hands of the public.

Said certificates were issued by the State of Virginia and accepted by her creditors under the following acts of the General Assembly of that State, to wit:

Under the act of March 30, 1871, certificates were issued for the sum of $15,281,970, of which it is alleged the Commissioners of the Sinking Fund and the Literary Fund held $2,578,518, leaving $12,703,451 in the hands of the public. Of these certificates issued to the public $10,851,294 had been deposited with the Virginia Commission on the fourth day of January 1906, and only $1,852,157 had not been deposited at that time.

Under the act of March 28, 1879, certificates were issued to the amount of $564,258, of which $463,892 had been deposited with said

commission at the date aforesaid, leaving $100,366 which had not been deposited. Neither the Commissioners of the Sinking Fund not the Literary Fund held any of these certificates. The act of the Legislature under which all these certificates were issued and accepted by the creditors expressly provided that they should be taken "as a full and absolute release of the State of Virginia from all liability on account of said certificates."

Under the act of February 14, 1882 certificates were issued to the amount of $1,775,603 of which $166,943 were issued to the Virginia Literary Fund and $1,608,660 were issued to the public. Of the amount issued to the public $1,313,792 had been deposited with the Virginia Commission on the date aforesaid, leaving outstanding at that time $294,868.

Under the act of February 20, 1892 certificates were issued to the amount of $605,320, of which $544,456 had been deposited on the date aforesaid, leaving $60,844 still in the hands of the old bondholders or their successors in interest. Neither the Commissioners of the Sinking Fund nor the Literary Fund received any of the certificates issued under said act.

The certificates for $1,774,603 issued under the act of 1882 and the $605,320 issued under the act of 1892 were in the following form, and the respondent avers that the State of Virginia has been wholly released from liability thereon:

No..... The Commonwealth of Virginia has this day discharged her equitable share of the (registered or coupon, as the case may be), bond for ..... dollars, dated ..... day of ....., from ..... to be accounted for to the holder of this certificate by the state of West Virginia, without recourse upon this commonwealth.

Done at the capitol of the state of Virginia, this ..... day of ....., eighteen hundred and ninety-two.

..... *Second Auditor.*

..... *Treasurer.*

And respondent says that the amount of certificates of all classes deposited with the Virginia Commission on the date aforesaid was $13,173,435.41, but respondent does not know what amount, if any, has been deposited since that time, and respondent asks that the State of Virginia be required to show on the hearing of this cause, what amount of certificates have been so deposited since January 4, 1906, and under what acts of the Legislature the same were issued. Respondent avers that all said deposits were made under and in accordance with the agreement made between the Virginia Commission and the Depositing Committee for the certifi-

cate holders on the 24th day of November, 1895, which, among other things, provides as follows:

> "And the said depositing committee agrees on behalf of the depositors of said deferred certificates so placed subject to the control of the said commission and on behalf of those entitled to the benefit of said certificates as assignees of said depositors or otherwise to accept as aforesaid such amount, either in cash or securities, as may be determined or ascertained in any such suit to be due by, or as may be realized through any adjustment or settlement as aforesaid from the State of West Virginia on account of the said certificates and on account of the bonds represested by and mentioned in the said certificates respectively, in full settlement and satisfaction of all claims on account of said certificates and on account of the bonds therein mentioned, and to accept and take such adjudication against the State of West Virginia in full discharge and acquittance of all claims in the premises against the State of Virginia."

And so respondent avers that the Commonwealth of Virginia has been wholly released from all liability on account of the said certificates and every part of them and has no legal or equitable interest in any claim based thereon, and that this suit was instituted and is being prosecuted by the said Commonwealth of Virginia solely as trustee for and on behalf of the holders of said certificates and not in her own right; and that she has agreed through her said commission with the said creditors that she is to incur no expense on account of this action and that the whole expense thereof is to be borne by the holders of said certificates in whose behalf and for whose exclusive benefit the same was instituted and is now being prosecuted.

XXIII.

This respondent for further answer to said bill says that all the matters and allegations therein contained and not admitted in this answer to be true or heretofore specifically denied, are now and hereby denied and strict proof thereof is required.

Wherefore, this defendant, having fully answered, confessed, traversed and avoided or denied all the matters in the said bill of plaintiff, material to be answered, according to her best knowledge and belief, humbly prays this Honorable Court that the said plain-

tiff's bill be dismissed and that this defendant have and recover her reasonable costs.

And as in duty bound she will ever pray, etc.

CLARKE W. MAY,
Attorney General,
J. G. CARLISLE,
CHAS. E. HOGG,
W. MOLLOHAN,
GEO. W. MCCLINTIC,
W. G. MATHEWS,
For West Virginia.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, SS:

This day there personally appeared before me, the undersigned authority in and for said County and State, William M. O. Dawson, Governor of the State of West Virginia, the defendant named in the foregoing cause, and being by me duly sworn, says that he is the Governor of the defendant, the said State of West Virginia, and that he has read the foregoing answer and knows the contents thereof, and that the matters and things therein contained and alleged are true as therein alleged and stated to the best of his information and belief.

.....
Governor of West Virginia.

Sworn to and subscribed before me this ..... day of October A. D. 1907.

.....
Clerk Supreme Court of Appeals.

Exhibits With Answer.

In the Supreme Court of the United States.

Original.

Commonwealth of Virginia

vs.

State of West Virginia.

Exhibit Number 1.

An ACT giving the consent of the Legislature of Virginia to the formation and erection of a new State within the jurisdiction of this State.

Passed May 13, 1862.

1. Be it enacted by the General Assembly, That the consent of the Legislature of Virginia be, and the same is hereby given to the formation and erection of the State of West Virginia, within the jurisdiction of this State, to include the counties of Hancock, Brooke, Ohio, Marshall, Wetzel, Marion, Monongalia, Preston, Taylor, Tyler, Pleasants, Ritchie, Doddridge, Harrison, Wood, Jackson, Wirt, Roane, Calhoun, Gilmer, Barbour, Tucker, Lewis, Braxton, Upshur, Randolph, Mason, Putnam, Kanawha, Clay, Nicholas, Cabell, Wayne, Boone, Logan, Wyoming, Mercer, McDowell, Webster, Pocahontas, Fayette, Raleigh, Greenbrier, Monroe, Pendleton, Hardy, Hampshire and Morgan, according to the boundaries and under the provisions set forth in the constitution for the said State of West Virginia and the schedule thereto annexed, proposed by the convention which assembled at Wheeling, on the twenty-sixth day of November, eighteen hundred and sixty-one.

2. Be it further enacted, That the consent of the legislature of Virginia be, and the same is hereby given, that the counties of Berkeley, Jefferson and Frederick, shall be included in and form part of the State of West Virginia whenever the voters of said counties shall ratify and assent to the said constitution, at an election held for the purpose, at such time and under such regulations as the commissioners named in the said schedule may prescribe.

3. Be it further enacted, That this act shall be transmitted by the executive to the senators and representatives of this common-

wealth in congress, together with a certified original of the said constitution and schedule, and the said senators and representatives are hereby requested to use their endeavors to obtain the consent of congress to the admission of the State of West Virginia into the union.

4. This act shall be in force from and after its passage.

EXHIBIT NUMBER 2.

SECOND AUDITOR'S OFFICE,
RICHMOND, NOV. 16, 1871.

A. W. Cambell, Esq., Secretary, &c.:

DEAR SIR:—Yours of the 14th was received. You ask me for a report upon a variety of questions connected with our public debt, the transactions of the Board of Public Works in regard to it, and the financial affairs of the State, which it is understood, of course, you propose to use in the contemplated adjustment of the portion to be paid by West Virginia of the debt.

To answer the questions propounded would involve an amount of labor which we could not bestow on the subject.

But, apart from this, I presume at an early day this office will be called upon by the Executive or the General Assembly of Virginia for detailed reports of all the matters referred to, which will be available to you.

The books and records of this office are open to your inspection.

I trust that in failing to respond to your inquiries you will not regard me as in any wise wanting in official courtesy to you or your associates. None, certainly, is intended.

I have the honor to be,
Most respectfully yours.
ASA ROGERS.

EXHIBIT NUMBER 3.

REPORT OF THE SENATE FINANCE COMMITTEE OF 1873.

STATE OF WEST VIRGINIA,
CHARLESTON, December 22, 1873.

The attention of the Committee on Finance has been repeatedly called by resolutions introduced in the Senate and otherwise, to the subject of Virginia's public debt and the share which it is equitable for West Virginia to bear and pay. The committee under these frequent promptings have been constrained to give the subjects their most earnest and careful attention as a matter fraught with

more than ordinary consequence to the State, and have come to a conclusion satisfactory to themselves, and it is believed that the conclusion of the committee will be approved by the judgment of the people interested, and will receive the sanction of any tribunal before whom it may be brought for adjudication.

It is necessary to a full understanding of this subject that reference be had to the treaty stipulations or fundamental conditions, by whatsoever name they may be called, between the representatives of the people of Virginia and the people desiring separation, by the creation of a new State, which led to the formation of a constitution, its adoption by the people and its approval by Congress, and the establishment of the State of West Virginia.

The ninth section of "an ordinance to provide for the formation of a new State out of a portion of the territory of this State," [Virginia] passed August 20, 1861, provided, that "the new State shall take upon itself a just proportion of the public debt of the commonwealth of Virginia *prior to the first day of January, 1861*, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of the debt was contracted; and deducting therefrom the monies paid into the treasury of the commonwealth from the counties included within the said new State during the same period."

Upon compliance with the conditions contained in the ninth section and here quoted the people within the counties now constituting West Virginia, were authorized to form a constitution to be presented to Congress for its approval and for the admission of the new State into the Union.

Accordingly a constitution was adopted by a convention of the people from the several counties now constituting the State of West Virginia and to carefully guard and secure the rights prescribed by Virginia as a condition precedent to the formation of the new State, a provision was incorporated into it to secure the exact fulfillment of the treaty stipulations as aforesaid.

By article eight, section eight of the constitution, it was provided that "an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State and that the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

This subject has received a careful consideration by commissioners appointed by authority of this State, and while this committee see much to approve in the Report of the Debt Commissioners of West Virginia on this subject for their great research and the ability with which they handled the subject, considering the peculiar difficulties under which they labored, as shown in their report, and in the illustration of the many problems that may rise in the discussion of this subject, yet this committee think the controlling

question has not been discussed by the Commissioners by reason of the embarrassment surrounding their action; and the Committee beg leave to refer to the report which is appended hereto and marked No. 1.

In construing the legal principles involved in this matter, it may be assumed that a private creditor of Virginia cannot sue West Virginia for contribution; for that is prohibited by the Constitution of the United States; see article eleven of amendments United States Constitution which declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens or subjects of any foreign State." But notwithstanding this prohibition the third article extends the judicial power of the Supreme Court to controversies between two or more States. Under this provision of the Constitution it is within the power of Virginia to institute and prosecute any suit against West Virginia touching the controversies respecting the public debt.

If the conditions precedent to our admission as a State, prescribed by Virginia herself, be accepted as a true basis of adjustment and final settlement, Virginia's claims for expenditures can very properly be offset by our contributions.

Upon this basis the whole subject is one of easy solution, containing no other items than that of creditor or debtor with balances to be struck upon agreed principles. The legislative history of Virginia establishes beyond a doubt that the first act of assembly to create a debt or issue a bond was passed in the year 1821, and the executive records show that the first bond issued by the commonwealth of Virginia was in the year 1822.

From this latter period we date the commencement of our liability under the fundamental stipulations prescribed by Virginia for our separation, which were accepted by the people of this State, approved by Congress, and the President of the United States, as the head of the executive department, and subsequently affirmed by the Supreme Court of the United States, and may at this day be accepted by the public as firmly engrafted into obligations and rights as if the same were constitutional provisions emanating from the supreme power.

The concurrent approval, binding alike upon the people of Virginia and West Virginia, lead us to the following conclusions which are the results of a mathematical demonstration, founded upon public and official records, appropriate to determine how much of the bonded debt of Virginia existing prior to January, 1861, was expended within the limits of this State, and how much was contributed by the counties forming the same.

The report of the Debt Commissioners hereinbefore referred to shows that all State expenditures within this State prior to January, 1861, amounted to $3,366,929.29, and although it is apparent that bonds for quite a large amount of this sum were never issued, nevertheless the expenditures would seem to import an obligation upon

our people to return every dollar which has been so contributed to the development of the territory of our State.

The committee have not entered into the tedious process of calculating the interest, for the obvious reason that there would be as much interest on our contributions to as upon the receipts of Virginia.

The committee have therefore assumed the foregoing sum of $3,366,929.29 as importing a debt upon West Virginia to be gathered and itemized from the report of the Debt Commissioners aforesaid.

From the amount of the foregoing expenditures must be deducted the moneys paid into the Treasury of the Commonwealth of Virginia, from the counties included in this State during the same period. For the sake of convenience the committee have charged to Virginia, not the whole contribution, but the surplus after deducting a just proportion of the ordinary expenses of the State government. Our total contributions from taxes to the State of Virginia in the year 1822, amounted to $63,000; and in that year the total of the expenses of the State government chargeable to us was $47,000, leaving an excess of $16,000, which would go to the liquidation of the debt created for expenditures within our midst.

This small surplus in 1822, by the process of an increased rate of taxation, and the increased value of the subjects to be taxed, the rate rising from 8 cents to 40 cents on every one hundred dollars in value, made the excess of our contributions to the treasury of Virginia in the year 1860 amount to $512,000, rejecting fractions.

Thus our contributions to the treasury of Virginia arising from taxes collected in that year amounted to $647,079.96. In the same year our proportion of the ordinary expenses of government amounted to $135,000, which left the surplus aforesaid of $512,079.96. It will be observed that the committee have referred only to the surplus in 1822 and in 1860. The surplus for the intermediate periods swell the aggregate of our contributions to $3,892,000 which is in excess of expenditures within our limits by $525,000.

It will thus be seen that our state is not indebted and the Committee confidently advance this statement, not only as containing the true basis of settlement between the two States, but it is supported by incontrovertible facts, by conditions precedent prescribed by Virginia under the restored government which government has been approved as aforesaid by Congress, by the Executive and by the Supreme Court of the United States.

Notwithstanding the satisfactory condition of our finances and our material resources, the attention of the committee has been called to the fact that "West Virginia certificates" and "West Virginia bonds" are quoted at the marketable value of from five to fifteen cents on the dollar, in money of the stock exchanges and markets of the United States. This of course has a tendency to depreciate the just credit to which this State is entitled. For it is acknowledged that the credit of a State depends upon the value of its taxable property, the amount of its indebtedness and above all

upon its punctuality in meeting its engagements. These quotations imply two things: first, that we owe a debt; second, that we are either unable or unwilling to pay the debt which beget a want of confidence in the minds of the public who are uninformed with respect to the true condition of West Virginia; and operate unjustly and injuriously upon us. It would seem to be enough for us to say, and we make the assertion without the fear of contradiction, that we owe no debt, that we have issued no bonds and our Constitution forbids the creation of a liability in the nature of a public debt; and with this assurance we cannot demand more nor expect less of all honorable stock brokers and bankers than the withdrawal from the list of indebted states the name of West Virginia.

"West Virginia certificates" and "West Virginia bonds" do not exist. No bonds have ever at any time been issued by West Virginia and we are prohibited from issuing at any time hereafter any bonds on the faith of this State. The bonds or certificates referred to were issued by Virginia, and West Virginia had no agency or participation therein.

In respect to the credit which our conduct and property would imply, we might be indifferent, but we have higher aims and more ennobling ambition. We desire to invite immigration, to cultivate our forests and to develop our mineral resources; this cannot be done with success, when men of thrift and capital are deterred from immigrating to and within our borders by reason of the persistent and unjustifiable misquotations of our credit. No one could be expected to invest capital within a State which has so far absorbed the substance of the people thereof that its good faith and obligations were only worth five cents on the dollar. West Virginia owes no debt, has no bonds for sale and asks no credit.

J. M. BENNETT,
Chairman.
JOHN W. GRANTHAM,
A. E. SUMMERS,
J. T. MCCLASKEY,
R. B. SHERRARD,
ELLIOTT VAWTER.

FILE COPY.

FILED.
MAR 3 1908
JAMES H. McKENN

Supreme Court of the United States.

OCTOBER TERM, 1907.

IN EQUITY.—ORIGINAL No. 3.

COMMONWEALTH OF VIRGINIA,
Complainant,

against

WEST VIRGINIA,
Defendant.

BRIEF FOR DEFENDANT ON COMPLAINANT'S MOTION TO REFER CAUSE TO MASTER.

C. W. MAY,
Attorney General.

JOHN G. CARLISLE,
JOHN C. SPOONER,
CHAS. E. HOGG,
W. MOLLOHAN,
GEO. W. McCLINTIC,
W. G. MATTHEWS,
Of Counsel for Defendant.

C. G. Burgoyne, Walker and Centre Streets, New York.

Supreme Court of the United States,

OCTOBER TERM, 1907.

COMMONWEALTH OF VIRGINIA, Complainant, AGAINST WEST VIRGINIA, Defendant.	Original No. 4. In Equity.

Brief for Defendant on Complainant's Motion to Refer Cause to Master.

The complainant proposes an interlocutory decree referring the cause to a master with a direction to the master to take an account ascertaining:

I.

"The amount of the public debt of the Commonwealth of Virginia as of the First day of January, 1861, stating specifically how and in what form the same was evidenced and by what authority of law and *for what purposes the same was created* and the dates and nature of bonds or other evidences of said indebtedness."

This paragraph was adopted in the decree proposed by the defendant, although in our view entirely unnecessary; but, upon reflection, it seems to require amendment in order to conform it to the allegations of the bill and the admission of the Answer. The

words "for what purposes the same was created" imply that the debt was created for diverse purposes. The bill alleges that "on the first day of January, 1861, your Oratrix was indebted in about the sum of $33,000,000 upon obligations and contracts made in connection with the construction of works of internal improvement throughout her then territory."

The bill is burdened with allegations as to the internal improvements, the motive which led the Commonwealth of Virginia to enter upon the policy, etc. The first sentence of paragraph I. of the Answer is as follows:

> "That she believes it is true as alleged that on the first day of January, 1861, plaintiff was indebted in 'about' the sum of $33,000,000, upon obligations and contracts made in connection with the construction of works of internal improvements within her then territory."

Then, upon the allegation of the bill that the indebtedness of about $33,000,000, as it existed prior to January 1st, 1861, was incurred in connection with the construction of works of internal improvement, both parties are by bill and Answer in accord. In so far, therefore, as paragraph I of the proposed decree calls for an investigation into the purposes for which the same was created, if by "purposes" it means for the accomplishment of objects other than the construction of works of internal improvement, it is a departure from the fact established by the pleadings. Unless that is admissible, which we deny, the paragraph is objectionable for its uncertainty of expression. It would be better in accord with the Bill and Answer, and more useful to the court and to the parties, if the words were stricken out and there were inserted in their place: "for what particular works of internal improvement the same was created and its proceeds expended and where the same were located."

II.

"What amount and *proportion* of said indebtedness and *what interest* accruing thereon *should in equity* be *apportioned to and be now paid by the State of West Virginia.*"

The defendant's objection to Paragraph two is radical and will fully appear in the argument submitted herein in support of *its* proposed Paragraph two.

The remaining paragraphs of the decree proposed by the complainant need not here be set forth.

On the other hand, the defendant proposes a decree which directs the master to ascertain:

II.

(*a*) "The amount of State expenditures made by the Commonwealth of Virginia prior to the First day of January, 1861, within the territory now included within the State of West Virginia, since any part of said indebtedness was contracted, as provided by the ordinance adopted by the Commonwealth of Virginia at Wheeling, August 20th, 1861."

(*b*) "The aggregate ordinary expenses of the State government of the Commonwealth prior to January 1st, 1861, and since any part of said indebtedness was contracted."

(*c*) "All moneys paid into the treasury of the Commonwealth of Virginia from the Counties included in the State of West Virginia during said period."

Paragraph III. of the complainant's proposed decree directs that the master:

> "III. Will make and return with his report any special or alternative statement of the account between the complainant and defendant in the premises which either may desire him to state or which he may deem to be desirable to present to the Court."

The difference between the two proposed decrees above quoted is radical, and presents to the Court a question which in our view is fundamental and which West Virginia contends, respectfully and very earnestly, should be decided before any reference to a master to state the account between the parties.

The jurisdiction of the Court over this case is settled by the decision overruling the demurrer. We are quite aware that the Court has recognized a distinction between suits by private parties in respect of the application of the rules of pleading and of practice, and suits between States. Thus it was held, in *Rhode Island vs. Massachusetts* (13 Peters, 23), that:

> "From the character of the parties, and the nature of the controversy, we cannot, without committing great injustice, apply to this case the rules as to time, which govern

Courts of Equity in suits between individuals. In the last-mentioned cases, the material allegations in the bill are comparatively few in number, and rest in the personal knowledge of the individual who is to put in his answer. But a case like this, and one, too, of so many years' standing, the parties, in the nature of things, must be incapable of acting with the promptness of an individual."

In *Rhode Island vs. Massachusetts* (14 Peters, 256), the Court, through Mr. Chief Justice TANEY, says:

"The case to be determined is one of peculiar character, and altogether unknown in the ordinary course of judicial proceedings. It is a question of boundary between two sovereign states, litigated in a Court of justice; and we have no precedents to guide us in the forms and modes of proceeding, by which a controversy of this description can most conveniently, and with justice to the parties, be brought to a final hearing. The subject was, however, fully considered at January term, 1838, when a motion was made by the defendant to dismiss this bill. Upon that occasion the Court determined to frame their proceedings according to those which had been adopted in the English Courts, in cases most analogous to this, where the boundaries of great political bodies had been brought into question. And acting upon this principle, it was then decided, that the rules and practice of the Court of Chancery should govern in conducting this suit to a final issue. The reasoning upon which that decision was founded is fully stated in the opinion then delivered; and upon re-examining the subject, we are quite satisfied as to the correctness of this decision (12 Peters, 735, 739).

"The proceedings in this case will therefore be regulated by the rules and usages of the Court of Chancery. Yet, in a controversy where two sovereign states are contesting the boundary between them, it will be the duty of the Court to mould the rules of Chancery practice and pleading in such a manner as to bring this case to a final hearing on its real merits. It is too important in its character, and the interests concerned too great, to be decided upon the mere technical principles of Chancery pleading. And if it appears that the plea put in by the defendant may in any degree embarrass the complainant in bringing out the proofs of her claim, on which she relies, the case ought not to be disposed of on such an issue. Undoubtedly the defendant must have the full benefit of the defense which the plea discloses; but at the same time, the proceedings ought to be so ordered as to give the complainant a full hearing upon the whole of her case. In ordinary cases between individuals the Court of

> Chancery has always exercised an equitable discretion in relation to its rules of pleading whenever it has been found necessary to do so for the purposes of justice. And in a case like the present, the most liberal principles of practice and pleading ought unquestionably to be adopted, in order to enable both parties to present their respective claims in their full strength."

West Virginia does not and could not successfully here contest the principles thus laid down, but the principles of equity and the rules of chancery procedure so far as *essential* to protect the rights of parties litigating in this tribunal will, of course, be substantially enforced. The application of some of the rules of procedure are certainly essential to substantial justice. Mr. Bates, in his work on Federal Equity Procedure (Vol. II., p. 802), says (section 753) :

> " Before a cause is referred to a master to take and state an account between the parties, the following preliminary steps should be taken, as conditions precedent to the reference, viz : (1) The pleadings should be perfected and the cause put at issue; (2) the parties should take the proofs upon the issues made by the pleadings, as fully as the nature of the case will allow ; (3) the cause should be regularly set down for hearing ; (4) the cause should be regularly heard upon the pleadings and the evidence by the court ; (5) *upon such hearing the court should pass upon all the issues made by the pleadings, and should enter an interlocutory decree declaring the rights of the parties,* and *also settling and declaring the principles upon which the account is to be taken ;* (6) the decree should refer the cause to a master to take and state the account in accordance therewith and report to the court, and all other matters should be reserved until the coming in of the report. * * * "

While the foregoing quotation refers to the equity practice which obtains in the *Circuit* and *District Courts* of the United States, so far as the practice is based upon substantial justice and is necessary for the protection of the rights of parties litigant, we suppose it will be pursued by this Court in the exercise of its *original* jurisdiction. If there were two bases of accounting in this case, both equally open to adoption by the Court, the objection of West Virginia to paragraph II. of the decree propcsed by the complainant, would be perhaps without force, but from our standpoint, it is conclusively apparent that there is but one basis upon which an accounting in this case for West Virginia's Equitable proportion

of the Virginia debt can be decreed. The bill alleges, in paragraph VI., that on the 20th day of August, 1861.

> " The Restored State of Virginia in convention assembled in the City of Wheeling, Virginia adopted an ordinance to 'provide for the formation of a new State out of portion of the territory of this State,' section 9 of which ordinance was as follows, to wit: '9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the 1st day of January, 1861, *to be ascertained by charging to it all the State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government, since any part of said debt was contracted, and deducting therefrom the moneys paid into the treasury of the Commonwealth from the Counties included within said new State during such period.* All private rights and interests in lands within the proposed State, derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia.'"

The bill also alleges, paragraph VII., that:

> " On the 31st day of December, 1862, an Act was passed by the 37th Congress of the United States providing that the new State thus formed in pursuance of the ordinance of the Wheeling convention above referred to, should, upon certain conditions, be admitted into the Union by the name of West Virginia with a constitution which had theretofore been adopted for the new State by the people thereof, such conditions being that a change should be made in the proposed Constitution with regard to the liberation of slaves therein."

Also that it was provided by the Act of Congress that whenever the President should issue a proclamation stating that such change had been made and ratified, the Act admitting such new State should be effective sixty days after the date of such proclamation.

The bill also alleges that a proclamation was issued by President Lincoln on April 20th, 1863 and that West Virginia in conformity therewith, and by the operation of said Act of Congress, was admitted into the Union as a State on the 20th day of June, 1863.

The bill also alleges, in paragraph X. *inter alia*, that

> " 'By section 8 of Article VIII. of the Constitution of West Virginia it is provided:
> " An equitable proportion of the public debt of the Com-

monwealth of Virginia prior to the First day of January, 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years.' "

The bill in paragraph XVIII. alleges the second of four grounds upon which the liability of West Virginia in this suit is asserted, as follows :

> " II. The liability of West Virginia for a just proportion of the public debt of the Commonwealth of Virginia as it existed prior to the creation and erection of the State of West Virginia, *forms part of her very political existence, and is an essential constituent of her fundamental law as shown in the said ordinance adopted at Wheeling on the 20th day of August, 1861, in which the method of ascertaining her liability on account of said debt is prescribed, and this liability is embedded in the Constitution under which she was admitted as a State into the Federal Union, and was one of the conditions under which she was created a State and admitted into the Union.*"

This is rhetorical, but it is none the less accurate and true.

The answer admits (paragraph VI.) the allegations of the bill as to the adoption and terms of the ordinance, including Section 9. It also admits the allegations of the bill averring the assumption of a liability and making provision for its ascertainment and payment by the constitutional provision quoted in the bill.

Paragraph XVIII. of the answer is as follows :

> " This respondent for further answer to said bill says : that she denies that the alleged liability of the State of Virginia for a just and equitable proportion of the public debt of the Commonwealth of Virginia rests upon any ground specified in Paragraph XVIII. of said bill *except* the *second, upon which, as hereinbefore averred in this answer,* the *State of West Virginia has always been ready and willing and is now ready and willing to adjust her liability.*"

Thus it stands *alleged in the bill* and *admitted by the answer*, and if it were not admitted by the answer, it is *conclusively estab-*

lished by the bill and its exhibits, that there was a solemn agreement entered into in 1861 between the State of Virginia and the new State of West Virginia, with the consent of the Congress, by which the latter State assumed (as one of the conditions of the assent of Virginia to her becoming a State) a just proportion of the indebtness of that Commonwealth as it existed prior to January 1st, 1861, *the manner of ascertaining which proportion was defined by the ordinance itself.*

The ordinance was, as treated by this Court in the case of Virginia vs. West Virginia (11 Wallace, 39), a *proposition* by the Commonwealth of Virginia to the people of the proposed new State. It was accepted by the constitutional convention of the proposed new State, carried into its Constitution and adopted by the people; and when the State was admitted into the Union by the Congress, with the assent of Virginia, *it became a completed compact between competent parties, upon adequate consideration, protected by the Constitution of the United States from impairment by either party.*

We say the ordinance defines what would be a just proportion. This is an accurate statement; for the ordinance provided not only for the assumption of a just proportion, but provided *specifically in what manner that proportion shall be ascertained.* We do not understand the suggestion which appears to have been made at the argument, that the continued obligation of the compact depends upon the *continued assent to it by both States.* A compact between States, entered into with the consent of Congress, has always been treated by this Court as irrevocable by *either* of the parties, and where the legislation of either has attempted to impair the obligation of a compact, it has been held void under the Constitution of the United States (See *Greene vs. Biddle*, 8th Wheaton, 1).

The obligation of a lawful compact between two States, justiciable in its nature, certainly is as binding in law upon *both* until abrogated by *both* in a constitutional way, as a contract between a State and an individual, or between two individuals, and a disregard or violation of it by one, certainly cannot thereby release it from its obligation.

It is difficult to understand how, from the averments of the bill and the admissions in the answer, and the argument at the Bar, it can be an *open question in this case* that the only liability of West Virginia for an Equitable proportion of the *ante-bellum* debt of Virginia is upon the basis of the ordinance.

The bill, in paragraph XVIII, summing up the grounds upon which it rests the liability of Virginia to account, says:

> "FIRST. The area of the territory now known as the State of West Virginia, formed about one-third of the territory of the Commonwealth of Virginia when this public debt was created, and its population included about one-third of that of the original state at the time of its dismemberment, and the State of West Virginia *by the acquisition and appropriation of said territory*, with the population thereof, *assumed therewith liability for a just and equitable portion of the public debt* created prior to the partition of said territory."

This is followed by the second ground, hereinbefore quoted, which is based upon the ordinance and Section 8 of the Constitution.

The third ground is as follows:

> "The State of West Virginia has further by repeated enactments and joint resolutions of her legislature recognized her liability for a just proportion of this debt."

The first ground invokes the application of what is assumed to be the rule of *international law* that "debt follows territory," and that the debt as between West Virginia and Virginia is to be "ratably apportioned" on the basis of *population* and *territory* at the time of the separation.

In support of this theory of liability, which is absolutely incompatible with the theory of liability based upon the compact, one of the learned counsel for the complainant read, on the argument, from the opinion of Mr. Justice FIELD, who wrote for the court in *Hartman vs. Greenhow* (102 U. S., 672) this sentence:

> "Where a state is divided into two or more states, in the adjustment of liabilities between each other, the debts of the parent state should be ratably apportioned among them."

counsel added, "That is in Hartman vs. Greenhow."

JUSTICE HARLAN: "Please read that again."

MR. CONRAD: "Where a state is divided into two or more states in the adjustment of liabilities between each other, the debts of the parent state should be ratably apportioned among them."

Counsel added: "That is an opinion of this court that has received no dissent."

With the greatest veneration for the learning and just fame of Mr. Justice FIELD as a jurist, we venture the observation that the subject was not at all involved in the case. The question there was solely as to the *receivability of coupons*, of bonds representing the funded debt of Virginia, *for taxes*. West Virginia was not a party; nor was Virginia. But aside from this the quotation read from Mr. Justice FIELD did not in the slightest degree correctly put before the Court the view which he must be deemed to have entertained. We supply the deficiency, quoting all that he said:

> "Writers on public law speak of the principle as well established that, where a State is divided into two or more states, in the adjustment of liabilities between each other, the debts of the parent state should be ratably apportioned among them. On this subject Kent says: 'If a State should be divided in respect of territory, its rights and obligations are not impaired; *and, if they have not been apportioned by special agreement*, their rights are to be enjoyed and their obligations fulfilled by all the parties in common' (1 Com., 26); and Halleck, speaking of a State divided into two or more distinct and independent sovereignties, says: 'In that case, the obligations which have accrued to the whole before the division are, *unless they have been the subject of a special agreement*, ratably binding upon the different parts. This principle is established by the concurrent opinions of text writers, the decisions of courts, and the practice of nations' (International Law, c. 3, Sect. 27)."

Mr. Justice FIELD continues:

> "In *conformity* with the doctrine thus stated by *Halleck*, both States—Virginia and West Virginia—have recognized in their constitution their respective liability for an equitable proportion of the old debt of the state, and have provided that measures should be taken for its settlement."

It is apparent that Mr. Justice FIELD, in the clause last above quoted, referred to the *special agreement* evidenced by Section 9 of the Ordinance and to the first clause of Section 8 of Article VIII. of the West Virginia Constitution.

It is worth noting that, in *Antoni vs. Greenhow* (107 U. S., 769), which also involved the same Funding Act, Mr. Justice FIELD, in his dissenting opinion, in which Mr. Justice HARLAN concurred, said, referring to the same subject :

> " It is a well-settled doctrine of public law that, upon the division of a state into two or more states, the debt shall be ratably apportioned among them (*See authorities upon this subject in Hartman v. Greenhow* (102 U. S., 672, 677)."

Phillimore, after quoting both Grotius and Kent, says :

> " If a nation be divided into various distinct societies, the obligations which had accrued to the whole before the division are, *unless they have been the subject of a special agreement*, ratably binding upon the different parts " ;

and Sir Sherston Baker in " First Steps of International Law," page 36, says :

> " The case is slightly different where one state is divided into two or three distinct and independent sovereignties. In that case the obligations which had accrued to the whole before the division are (*unless they have been the subject of a special agreement*) ratably binding upon the different parts. This principle is established by the concurrent opinions of text writers, the decisions of courts and the practice of nations. It is incorporated into the treaty by which the modern Kingdom of Belgium was established."

Thus it will be seen that the general rule as quoted from Mr. Justice FIELD, is *essentially qualified* by the authorities which he quotes, in this, that a *special agreement* between the two states in respect of the assumption of a proportion of the debt as it existed before the separation, *takes the case out of the general rule ;* so that the second ground alleged in the bill, which specifically avers a *special agreement, destroys the applicability of the rule to this case.* Upon what theory is this special agreement, consisting of a proposition by Virginia, its acceptance by the constitutional convention, its embodiment in the Constitution, the ratification of the latter by the people, and the admission of the State into the Union by the Congress, to be so cavalierly dismissed

from this case as the decree proposed on behalf of Virginia would do? This Court had occasion to consider the validity of this ordinance in the case of *Virginia vs. West Virginia*, 11 Wallace, 39, in respect of the provision contained in it for the incorporation of the counties of Berkeley and Jefferson in the latter State conditioned upon a popular vote therefor; and the Court said:

> "There was then a valid agreement between the two states consented to by Congress, which agreement made the accession of these counties dependent on the result of a popular vote in favor of that proposition."

If the ordinance was valid *then* in respect of the incorporation of the two counties, upon what theory can it be held to be invalid as to the specific provision contained in Section 9 for the assumption by the new State of a just proportion of the indebtedness *to be ascertained in the manner defined*, clearly carried into the Constitution of the new State and assented to by Congress by the admission of West Virginia into the Union? It does not impeach or even belittle the "Restored State of Virginia" or the validity of its acts to refer to it as a "revolutionary government" or to the ordinance as a "revolutionary proceeding." Whether it was or was not the lawful government of Virginia was a political question. When the House of Representatives admitted the members of Congress from that State and the Senate admitted the senators elected by the legislature of the "Restored State," and the President recognized that government as the true government of Virginia, that forever settled its legality and regularity beyond the power of judicial review and made valid its acts *ab initio*. But for that "Restored State of Virginia," and its recognition by the political departments of the Federal Government, there would have been no government of Virginia *under the Constitution* of the United States from April, 1861, to the close of the war. The ordinance of the Wheeling convention of '61, which was the genesis of the State of West Virginia, and the adoption of its Constitution, are, from the standpoint of law, as clearly acts of the Commonwealth of Virginia as if they had taken place in 1851 instead of in 1861.

The suggestion so often made in oral and printed argument that West Virginia is the "daughter of Virginia," is sentimental, but in-

accurate. When admitted into the Union she came in on an equality with the original states and became a member of the sisterhood of states, equal in sovereignty and personality to the older commonwealth of which her territory had once been a part, and of which her people had once been citizens.

May it not be that this misconception of the real relation of West Virginia as a State of the Union to old Virginia has played an unconscious part in the disregard by the latter of the special agreement which has operated to delay an adjustment under its provisions? If this special agreement in respect of the proportion of the debt of Virginia which was to be assumed by the State of West Virginia constituted a valid compact between the two states, when it did cease to be valid, and for what reason, at the suit of Virginia, is it to be ignored? It was said, by Mr. Justice BALDWIN, in *Rhode Island vs. Massachusetts* (12 Peters, 748), speaking for the Court:

> "In Poole vs. Fleeger, this Court declared that an agreement between States, consented to by Congress, bound the citizens of each State."

Greene vs. Biddle, supra, involved the validity of the compact between Virginia and Kentucky, entered into at the time she separated from the former and was admitted into the Union as a State, and the compact in that case in respect of the assent of Congress to it, is not unlike the compact in the present case. The Court said:

> "The compact was entered into between Virginia and the people of Kentucky, upon the express condition that the general government should, prior to a certain day, assent to the erection of the District of Kentucky into an independent State, and agree, that the proposed State should immediately, after a certain day, or at some convenient time future thereto, be admitted into the federal Union. On the 28th of July, 1790, the convention the District assembled under the provisions of the law of Virginia, and declared its assent to the terms and conditions prescribed by the proposed compact; and that the same was accepted as a solemn compact, and that the said District should become a separate State on the 1st of June, 1792. These resolutions, accompanied by a memorial from the convention, being communicated by the President of the United States to Congress, a report was made by a committee, to whom the subject was referred, setting forth the agreement of Virginia, that Kentucky should be erected into a State, *upon certain terms and con-*

ditions, and the acceptance by Kentucky *upon the terms and conditions so prescribed;* and, on the 4th of February, 1791, Congress passed an act, which, after referring to the compact, and the acceptance of it by Kentucky declares the consent of that body to the erecting of the said District into a separate and independent State, upon a certain day, and receiving her into the Union.

"Now, it is perfectly clear, that, although Congress might have refused their consent to the proposed separation, yet they had no authority to declare Kentucky a separate and independent State, without the assent of Virginia, or upon terms variant from those which Virginia had prescribed. But Congress, after recognizing the conditions upon which alone Virginia agreed to the separation, expressed, by a solemn act, the consent of that body to the separation. The terms and conditions, then, on which alone the separation could take place, or the act of Congress become a valid one, were necessarily assented to; not by a mere tacit acquiescence, but by an express declaration of the legislative mind, resulting from the manifest construction of the act itself. To deny this, is to deny the validity of the act of Congress, without which, Kentucky could not have become an independent State, and then it would follow, that she is at this moment a part of the State of Virginia, and all her laws are acts of usurpation."

It was held that the act passed by the Legislature of Kentucky in violation of the compact was void.

The suggestion that Virginia never assented to the compact with West Virginia because of the amendment which Congress proposed to the Constitution, is without weight.

The conditions imposed by Virginia upon West Virginia were embodied in the Ordinance. It may be admitted that any amendment proposed by Congress which would vary the terms of the *Ordinance* might have been operative to destroy the consent of Virginia to the erection of a new State out of her territory, but her General Assembly was content with the Constitution as not being in violation of the ordinance, and the amendment proposed by Congress to the Constitution, relative to slavery, was a matter with which Virginia could have no concern, it being purely local to the the State of West Virginia, as affecting the status of property and persons within her borders and under her sovereignty. It sustained no relation whatever to the Ordinance or to the conditions upon which Virginia had given her assent. It is almost an evidence of desperation that, at this day, it should be solemnly argued in this Forum in behalf of Virginia that West Virginia did not become a

State with the assent of Virginia, because Congress decided, in response to representations from West Virginia, to require, as a condition of admission, an amendment to the Constitution providing for the gradual extinction, within her borders, of slave ownership.

We have asserted that the Ordinance was carried into the Constitution. The provision is as follows:

> "ARTICLE VIII. Section 8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and to redeem the principal within thirty-four years."

It will be noted that this language of assumption is the language of the ordinance except that the word "equitable" is used in the Constitution, while the word "just" is used in the ordinance. As a qualifying word, used in such a connection, "equitable" and "just" are synonymous. An equitable proportion could not be other than a "just" proportion, and a just proportion would be an "equitable" proportion. The ordinance and the Constitution are the constating instruments upon which the State was erected and they are to be read *in pari materia*, and it is not susceptible of doubt that the word "ascertain" as used in Section 8 of the Constitution is an adaptation of the word "ascertained" in section 9 of the Ordinance. It will be remembered that this convention assembled within ninety days after the adoption of the Ordinance. Its sole warrant for assembling was the ordinance. Its authority to frame the Constitution was derived from the ordinance. The ordinance as a whole was a proposition to that Convention and, as a whole, was accepted by the Convention. The Convention complied with all the provisions of the Ordinance. The Constitution was framed to meet all the requirements of the Ordinance. It was the basis of the Constitution.

It is difficult to consider with equanimity, the studied and inconsistent attempt to eliminate the Ordinance from the case. This is apparently the present posture of counsel for Virginia. If section 8 of the Constitution is not read in connection with the Ordinance, and, therefore, as an assumption of an equitable proportion of the debt to *be ascertained as provided in the Ordinance*, the Ordi-

nance is eliminated, and section 8 of the first Constitution is to be construed as the assumption by the new State of an equitable proportion of the public indebtedness of Virginia prior to January 1st, 1861, upon the basis of *population* and *territory*. It is inconceivable that such can be the law of this case. The assembling of the Convention was an acceptance of Section 9 of the Ordinance. The Ordinance embodied the conditions, and section 9 by no means the least important of them, of Virginia's consent to the erection of the new State out of her territory.

If the Convention had failed to comply, *in the Constitution*, with the *requirements of the Ordinance*, or had departed in any way from the conditions of Virginia's assent, as stated in the Ordinance, its work would have been nugatory. It was bound by the ordinance to carry into the Constitution the assumption by the new State of an equitable proportion of the indebtedness of Virginia prior to January 1st, 1861, to be ascertained as provided in the Ordinance.

It could no more disregard the terms of Section 9 than it could the other conditions of the ordinance. It was for Virginia to fix the terms of her consent. It was not for the convention to depart therefrom. It could only accept or reject. If it rejected it, it must have adjourned. Its work would have been done. Although we take it that nothing is finally decided in this case except the question of jurisdiction, we note that the court was impressed, as shown by the opinion of the Chief Justice with the relation of the ordinance to the Constitution. In the opinion it is said :

> " Reading the Virginia ordinance and the West Virginia constitutional provision *in pari materia*, it follows that what was meant by the expression ' that the legislature shall ascertain ' was that the legislature should ascertain as soon as practicable the result of the pursuit of the method prescribed and provide for the liquidation of the amount so ascertained."

The attempt to dislocate the first clause of section 8 of Article VIII. of the Constitution of West Virginia " an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State " from section 9 of the Ordinance, is subversive of fundamental principles of Constitutional construction and is indefensible from every standpoint of law or equity. It is beyond all reason to suppose that the plain language of the first clause of Article VIII., general in its terms, was anything more or less than an acceptance of the

proposition theretofore specifically made in section 9 of the Ordinance in order that the first clause of section 8 and section 9, would together make plain the compact.

The suggestion that section 8 of Article 8 of the Constitution had no reference to section 9 of the Ordinance, assumes that the new state was taking upon herself an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, without definition or understanding as to the basis upon which it was to be ascertained, therefore leaving open the vital question as to what would constitute an equitable proportion, for future adjustment between the two states. This is not to be believed.

The debt of the Commonwealth of Virginia on January 1st, 1861, was doubtless well known throughout the State of Virginia. It was a matter of public record and reduced to a certainty. It is alleged in the bill that about $33,000,000 of it were incurred in connection with the construction of works of internal improvement—an enormous sum " in those days." If it had been the purpose of Virginia, in requiring as a condition of her assent, the assumption by the proposed new state of an equitable proportion of the public debt without specification as to the manner in which, and the basis upon which that proportion should be ascertained, it is inconceivable that the language of section 9 of the Ordinance would have been what it was, and that the language of section 8 of Article VIII. of the Constitution would have been what it was. It was entirely for Virginia to dictate the terms, and if it had been her purpose to require an assumption of the debt upon the basis of territory and population, West Virginia would have been required to assume " one-third of the debt as it existed prior to the first day of January, 1861," or " an equitable proportion to be ascertained upon the basis of territory and population." If she had so provided in Section 9 of the Ordinance, the first clause of Section 8 of Article VIII. of the Constitution would have *adequately assumed liability upon that basis.* But no such proposition was made to her. No such condition of assent to her statehood was imposed upon her and there is no reason to believe that in her then condition in respect of financial ability, her people would have been willing to enter upon the status of statehood burdened with $11,000,000, or thereabouts, of the indebtedness of the old state. At all events, she was neither called upon nor given an opportunity to decide whether she would accept statehood upon such a condition.

If section 9 of the Ordinance had provided " The new state shall take upon herself a just proportion of the public debt of the Com-

monwealth of Virginia prior to the first day of January, 1861, to be ascertained upon the basis of territory and population " or " The new state shall take upon herself one-third of the public debt of the Commonwealth of Virginia prior to January 1st, 1861 ", would West Virginia be heard here for a moment to contend that the Ordinance was no part or basis of the Constitutional provision and that the court is at liberty to adopt some other basis than that agreed upon by the parties ? It would not tax the ability of the distinguished counsel on the other side, to demolish such a proposition. And section 9, as it was written, defining the basis upon which the new state should take upon herself an assumption of a just proportion of the public debt as completely forecloses the question of basis as would have been the case had the language of the Ordinance been as we have suggested.

To rub out section 9 of the ordinance and put upon West Virginia, liability for one-third of the debt of the Commonwealth of Virginia, as it existed prior to January 1st, 1861, upon the theory that this was what she assumed by section 8 of Article VIII. of the Constitution, is a proposition as unjust as it is untenable. Indeed, if the opposite theory were adopted no testimony need be taken except to ascertain the amount of the public debt of Virginia on the first day of January, 1861, and the proportion of population and territory of the new state to that of the Commonwealth of Virginia at the time of the separation. If the Ordinance were eliminated it follows that the assumption of an equitable proportion of the debt by section 8 of Article VIII. of the Constitution of West Virginia was purely voluntary *and not in any sense a condition of the assent of Virginia to the admission of West Virginia as a state into the Union.* This is contrary to repeated allegations of the bill and against the truth as disclosed everywhere in the record. If section 9 of the Ordinance were eliminated, it is a grave question whether, but for an assumption of liability by section 8 of Article VIII. of the Constitution, West Virginia would have been legally liable at all, upon principles of international law, for a dollar of that debt (See Hall on International Law, sec. 27, p. 78, and especially note on p. 80).

An effort is argumentatively made in the bill and was repeated at the bar, and it seems to have somewhat impressed the court, to make it appear that Sections 5 and 7 of Article 8 are a recognition, not only of the liability to assume a portion of the indebtedness of Virginia, but as a recognition of liability to Virginia for grants of land and money made by the Acts of February 3 and 4, 1863.

Although not especially material, with great deference, we are unable to agree to this construction. Section 5 of Article 8 provides:

> "5. No *debt* shall be contracted by this state except to meet casual deficits in the revenue, to redeem a *previous liability* of the state, to suppress insurrection, repel invasion or defend the state in time of war."

And Section 7 of the same article provides:

> "7. The legislature may *at any time* direct a sale of the stocks owned by the state, in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the *public debt* and hereafter the state shall not become a stockholder in any bank."

We do not see that the words "a previous liability," in Section 5, and the words "public debt," in Section 7, can be construed, all things considered, as referring to *any liability* of the new state to Virginia. Both Sections 5 and 7 were manifestly intended to be permanent provisions of the Constitution. They would have been properly included in the Constitution if Virginia, at the time of separation, had owed not a dollar of debt. Section 5, in our view, was intended to express the policy of the state as to indebtedness. The word "debt" is used here in contradistinction from the word "liability." A debt is a liability, but a liability is not necessarily a debt, and where they are *both used in the same clause*, as above, they are not to be construed as synonymous. The phrase "a previous liability" is altogether indefinite, and has no regard to the time at which it is incurred, except that it must have been incurred *prior* to the *contracting of a debt* with which to redeem it. The provision will apply to any liability incurred during the history of the state, which *thereafter* must be provided for by the contracting of a debt. It was the evident policy of the Constitution that West Virginia should "pay her way" except as therein otherwise indicated. If it is uncertain whether anything will be demandable by virtue of the contract, it cannot be called a debt. "Debt," as used here, we think, means a certain sum of money due upon an express agreement.

Hagar vs. Reclamation District, 111 U. S., 701.

The theory of the constitutional provision was, we submit, that the state should rely upon taxation and current revenues to carry on its operations, and was to prohibit the contracting of debts (borrowing of money), evidenced by bonds or otherwise, except to meet

casual deficits in revenue, etc., *which would involve a previous liability*. In other words, that money should not be borrowed, *save as excepted*, in *anticipation of liabilities*. The words "public debt" in Section 7 are not to be construed as having any reference to unliquidated demands. It will not be pretended that until an accounting West Virginia owes a "debt" to Virginia. She has assumed a liability which may or may not ripen into a debt, only to be determined by a judicial accounting or by voluntary adjustment.

Section 7 was likewise a permanent provision of the Constitution. To say otherwise is to assume that there was not to be any "public debt" *except* the debt to be contracted under the ordinance when its amount shall be ascertained. This assumption is untenable, for Section 5 authorizes the state to borrow money to meet casual deficits in the revenue, to redeem a previous liability of the state, to suppress insurrection, repel invasion or defend the state in time of war. Very conclusive evidence that this is the true construction of these provisions is to be found in the fact that in the new constitution of West Virginia adopted in the year 1872 from which was *omitted* Article 8 of Section 8 which was in the Constitution of 1861, is found this provision.

Sec. 4, Article 10) :

> "No debt shall be contracted by the state except to meet casual deficits in the revenue, to *redeem a previous liability* of the state, to suppress insurrection, repel invasion or defend the state in time of war, but the payment of any liability other than that for the ordinary expenses of the state shall be equally distributed over a period of at least twenty years."

Strongly supporting the view which we urge is the fact that in the Constitution of *Virginia* of *1867–8*, Article X., section 7, is found this provision :

> "No debt shall be contracted by this State except to meet casual deficits in the revenue, to *redeem a previous liability* of the State, to suppress insurrection, repel invasion or defend the State in time of war."

This seems to have been rather a customary permanent Constitutional provision in that region.

But a better reason, why sections 5 and 7 of Article VIII. of the West Virginia Constitution should not be construed as having any reference whatever to any liability of West Virginia to the Com-

monwealth of Virginia is that by section 8 of the same Article, it was provided :

> " An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January in the year 1861, shall be assumed by this State ; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."

This is a provision not susceptible to misconstruction in respect of the subject to which it refers. Its language is not general. It is in its nature a temporary provision. It deals with but one thing and that is the assumption by West Virginia of a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, with a provision for its ascertainment and liquidation.

It is hardly to be supposed that three distinct sections of Article VIII., two of them general and permanent and one specific and self-executing so far as the assumption of the indebtedness was concerned, were deemed necessary in order to carry into the constitution the provision of section 9 of the Ordinance. The omission of the clause in the next Constitution was very natural and nowise sinister. It would have been absurd to readopt it in the Constitution. The liability had been solemnly assumed, and once assumed in the Constitution, it was an acceptance of the proposition of the Ordinance and, with the assent of Congress, by her admission into the Union became an irrevocable compact between West Virginia and Virginia. It is as valid to-day as it was when it was made, It could not be subtracted from by omission to repeat it in every new or revised Constitution, nor could it be added to by frequent repetition. Any act passed by the Legislature of West Virginia or any subsequent Constitutional provision attempting to repeal this assumption of liability would be void under the Constitution of the United States ; and it is as binding upon *Virginia*, who was a party to it, as it is on *West Virginia*,

But *under Section 5 of Article VIII.* it is perfectly clear that when the proportion of the public debt of Virginia prior to the 1st day of January, 1861, to be borne by West Virginia under the ordinance and the constitutional provision shall have been ascertained, as provided by the former, a " debt " may lawfully be contracted by the State to redeem it, upon such terms as the legislature may pre-

scribe. The question is: Was the ordinance binding and is it still binding?

If it be valid and binding, it is impossible for us to discover any ground upon which it can be disregarded by the Court, for if it is binding upon the states, it is binding upon the court. True, West Virginia could not by any suit prevent Virginia from disregarding it in the adjustment with her creditors of her debt or any portion of it. But when Virginia invokes the original jurisdiction of this Court in a suit against West Virginia to compel her to account for an equitable proportion of her debt prior to January 1, 1861, upon the basis of the ordinance *and upon other and different bases*, she may plead the ordinance as the only basis upon which the Court can decree an accounting by her. The Court will not make a new contract for the parties. They were competent to make one for themselves, and they did make one for themselves. It is unfortunate that the two states were unable many years ago to adjust the matter in accordance with the agreement which they had entered into and which subsist between them. Without asserting that the fault for delay rests solely with either, we have a right to say on the record that it does not lie in the mouth of Virginia to impute much, if any, of the fault for delay to West Virginia. The records of this Court show that in December, 1866, Virginia instituted a suit in equity in this Court against the State of West Virginia to test the question whether the Counties of Berkeley and Jefferson were or were not a part of the territory of West Virginia. The cause was not determined until the 6th day of March, 1871, upon which day it was decided in favor of West Virginia, and until it was settled, obviously there could be no accounting under the ordinance, for the boundaries of West Virginia depended upon the decision, and until it was determined what Counties were a part of West Virginia, the basis for accounting under the provisions of the ordinance was wanting.

This Court takes judicial notice of the general laws and constitutions of the states. The Constitutional Convention which assembled at Alexandria on the 11th day of April, 1864, framed and adopted a constitution, it not being submitted to the people for ratification. Section 27 was as follows:

> "The General Assembly shall provide by law for adjusting with the State of West Virginia the proportion of the public debt proper to be borne by the States of Virginia and West Virginia, respectively, and may authorize, in conjunction with the State of West Virginia, the sale of all lands

and property of every description, including all stocks and other interests owned and held by the State of Virginia in banks, works of internal improvement, and other companies, at the time of the formation of the State of West Virginia, *and no ordinance passed by the Convention which assembled at Wheeling on the 11th day of June, 1861, adjusting the public debt between Virginia and West Virginia shall be binding upon this State.* It shall provide for the payment of any debt or obligation created in the name of the State of Virginia by the usurping and pretended authorities at Richmond, and shall not allow any County, City or corporation to levy or collect any taxes for the payment of any debt created for the purpose of effecting any rebellion against the State or the United States. The legislature shall not provide for the payment of any bonds now held by rebels in arms against the State or United States Government."

This convention was provided for by the General Assembly of Virginia of 1863. Relatively few delegates were elected for the districts were mostly within the Confederate lines. The Constitution was adopted by the convention but was not required, nor was it submitted to a vote of the people. Under this Constitution the government of Virginia was conducted until it was superseded by another Constitution adopted some years later. We apprehend that no lawyer would contend that this attempted repudiation of section 9 of the ordinance of the Wheeling Convention, embodied in the Constitution of Virginia, adopted in convention *after the State of West Virginia had been for over a year in the Union*, was of the slightest validity. Nevertheless, it showed bad faith and doubtless had a tendency to prevent an energetic effort by West Virginia for the ascertainment of the liability under the ordinance with that government.

The Court will find appended to the bill as an exhibit the argument of Mr. Randolph Harrison, representing the Virginia Debt Commission, before the Joint Committee on Finance of the West Virginia Legislature, February 1, 1905, in relation to West Virginia's contributive share of the debt of Virginia, an unusual document to be found in such a relation, but certainly the complainant is not in position to impeach its accuracy, for it is made a part of its bill, In that argument Mr. Harrison says:

"In February, 1870, Virginia sent delegates to Wheeling, West Virginia, then the capital of the State, for the purpose of inviting the Governor and the legislature of West Virginia to unite with her in making a statement in settlement of this account, but the Governor of West Virginia did not think the

time opportune to deal with the subject, because the suit between the two states involving the counties of Jefferson and Berkeley had not then been decided. *Soon thereafter the Governor of West Virginia sent Commissioners to Virginia with authority to state the account, but at that time Governor Walker of Virginia, did not feel that he had authority to appoint commissioners, because the legislature of Virginia had in the meantime passed an act to submit the question to arbitration, and so nothing came of this effort to settle the controversy.*"

It cannot therefore upon the basis of the Bill be truthfully said here that West Virginia was in the beginning laggard in respect of attempting to adjust on the basis of the ordinance the burden which she had assumed by her acceptance of it. She could not do it without the co-operation of Virginia.

Then came the enactment, on March 30, 1871, by the General Assembly of Virginia of the first funding bill, approved March 30, 1871 (Exhibit No. 1 of the bill). By this act Virginia *herself* undertook to "apportion," without consulting West Virginia, the debt between *herself and West Virginia* upon the assumed international law basis, and adjusted it upon the basis that Virginia's share of the debt was two-thirds, and *West Virginia's share was one-third;* which act provided for the issue of several million dollars of what were known in the market as "West Virginia certificates" for one-third of the debt. This was in utter disregard of the compact. If she had settled with her creditors on the basis of two-thirds, and left open the ascertainment, on the basis of the ordinance, of West Virginia's share, without issuing the "West Virginia certificates," it would have been simply her affair. But the preamble to this act challenges attention. It is as follows:

"WHEREAS, in the formation of the State of West Virginia there were included within its boundaries about one-third of the territory and population of the State of Virginia; and

"WHEREAS, *in the ordinance authorizing the organization of such state it was provided that the said State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, which provision has not yet been fulfilled, although repeated and earnest efforts in that behalf have been made by this State, and will continue to be made as long as may be necessary;* and

"WHEREAS, the people of this Commonwealth are anxious for the prompt liquidation *of her portion of said debt,* which is estimated to be two-thirds of the same; and

"WHEREAS, it has been suggested that the authorities of

West Virginia may prefer to pay that *State's portion of said debt* to the holders thereof, and not to this State, as the Constitution of this State provides;

NOW, THEREFORE, to enable the State of West Virginia to settle *her proportion* of said debt with the holders thereof and to prevent any complications or difficulties which might be interposed to any other matter of settlement, and for the purpose of promptly restoring the credit of Virginia by providing for the prompt and certain payment of the interest upon her portion of said debt as the same shall become due therefor;

"1. Be it enacted by the General Assembly of Virginia," etc.

Here, the Court will observe, is a distinct reference in the second clause of the preamble of the first funding act, to the *Wheeling ordinance*, under *which West Virginia was to take upon herself the just proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861*, with the declaration that it had not yet been fulfilled, although repeated and earnest efforts in that behalf had been made by this State, "and will continue to be made as long as may be necessary." This ordinance is made the basis of her funding legislation.

How strange it seems that in this legislation asserting the liability of West Virginia to be based upon section 9 of the ordinance, and declaring that it would be continuously insisted upon, its terms, brief as they were, should have been garbled, and that the legislature should have proceeded to ignore it. But the reference to section 9 of the ordinance in the preamble was operative in law to incorporate it *all*, and to put upon notice of its terms as measuring the liability assumed by West Virginia thereunder, every person who accepted a bond or a certificate issued under that act and under the subsequent acts.

In the act of 1879, approved March 28, 1879, Exhibit No. 2 of the bill, it was provided by section 7:

"The owners of all classes of bonds mentioned in this act who shall exchange their securities for the bonds created under this act, and who shall not have yet received certificates representing the *remaining one-third of their principal and interest due and payable by the State of West Virginia*, shall receive certificates of a like character to those issued under the act of March 30, 1871, when they made such exchange, etc."

In the act of February, 1882, Exhibit 3 of the bill, it is provided:

> "6. For all *balances* of such indebtedness constituting *West Virginia's share of the old debt*, principal and interest, in the settlement of Virginia's equitable share as aforesaid, the said Board for Sinking Fund Commissioners shall issue a certificate as follows:
>
> "No. . The Commonwealth of Virginia has this day discharged her equitable share of the (registered or coupon, as the case may be) bond for , held by , dated the day of , numbered , leaving a balance of , with interest from , *to be accounted for by the State of West Virginia without recourse upon this Commonwealth.*"

Exhibit No. 4, Chapter 325, provides for the issue of similar certificates, "to be accounted for to the holder of this certificate by the State of West Virginia."

In the act, Exhibit No. 5, Chapter 747, after reciting in the preamble the various funding acts of 1871, 1879, 1882 and 1892, occurs the following:

> "WHEREAS, in each of said acts provision is made for issuing to creditors of the original State of Virginia which should accept the new bonds provided for by said several acts, certificates for such proportion of the obligations surrendered by them as was *deemed proper to be borne by the State of West Virginia*, to wit, *one-third of the amount of said obligations*, of which certificates this State holds a large amount, through the agency of the Commissioners of its Sinking Fund and Literary Fund; and
>
> WHEREAS, the present State of Virginia has settled and adjusted to the entire satisfaction of her people and her creditors the liability assumed by her on account of two-thirds of the debt of the original State;
>
> "NOW, THEREFORE, be it resolved," etc., "that a commission of seven members is hereby created," etc., "which is known as the Debt Commission, and said Commission is hereby authorized and directed to negotiate with the State of West Virginia a settlement and adjustment of the proportion of the public debt of the original State of Virginia properly to to be borne by West Virginia;" concluding with this language:
>
> "But said Commission shall in no event enter into any negotiation hereunder, *except upon the basis that Virginia is*

bound only for the two-thirds of the debt of the original State, which she has already provided for as her equitable proportion thereof."

Thus beginning with 1871, Virginia has proceeded without regard to her compact to adjust two-thirds of the indebtedness as her own, and to issue $18,000,000 or thereabouts, of West Virginia certificates, frequently characterized in the act as West Virginia's proportion, and several millions of them bearing on their face the statement that they are to "be accounted for to the holder of this certificate by the State of West Virginia, without recourse upon this Commonwealth," and hawked about in the markets, to the injury of the credit of West Virginia. Is the State of West Virginia much to be chided for the delay which has occurred in adjusting with Virginia this matter on the basis of the ordinance?

But there would seem to be, from the bill and the argument on behalf of Virginia in this Court, no question open here as to the validity and binding force of the compact created by the proposition in the ninth section of the Wheeling ordinance, its acceptance by the Convention of November, 1861, its incorporation in the constitution of West Virginia, its ratification by the people of the State, and the assent of Congress to it, evidenced by the admission of the State into the Union.

It was said on the argument by the learned Attorney-General of Virginia, who officially and very ably represents the Commonwealth in this cause, after outlining, at page 323, what he thinks *would have been* a fair adjustment and coming to the ordinance, as follows:

> "MR. ANDERSON: In the 11th Wallace case it was established that the Wheeling government was the government of Virginia, and the effect of that decision was to uphold the validity of what is known as the Wheeling ordinance.
>
> "Now instead of letting these questions be settled upon the principles of equity and public law, that convention prescribed this artificial and arbitrary basis of adjustment. *We have to concede that we cannot go behind this, that we must accept it.*
>
> "Section 9 of the ordinance, giving the consent of Virginia to the formation of the new State, reads as follows:
>
> "MR. JUSTICE HARLAN: What are you reading?
>
> "MR. ANDERSON: From the Wheeling Ordinance quoted at page 3 of the brief of the counsel for the plaintiff. Section 9 of the ordinance reads as follows:
>
> "'9. The new State shall take upon itself a just propor-

tion of the public debt of the Commonwealth of Virginia, prior to the 1st day of January, 1861, to be ascertained by charging to it all of the State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted, and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during said period.'

"*That is the basis upon which the consent of the Commonwealth of Virginia was given to the formation of this new State. The stipulation imposed by Virginia upon West Virginia as a condition upon which her consent was given, and which afterwards, in forming the State of West Virginia, the people of that new Commonwealth accepted and assented to, was that the new State should assume and take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, to be ascertained in the manner therein prescribed. That was a fundamental as well as a contractual provision, and it constitues a primary obligation and lies at the very foundation of the right of West Virginia to be a State.*"

Nothing could be stronger than this statement nor could anything be more accurate.

It is very difficult to reconcile this explicit and conclusive statement by the chief law officer of the Commonwealth of Virginia, in respect of the binding force and effect of the ordinance, with the decree which he proposes on behalf of Virginia and the brief which he submits in its support; for this proposed decree asks the Court to ignore the ordinance, to treat the matter as being as completely open as if the ordinance had never been adopted or accepted; and to commit the case at large to a master to ascertain as an original proposition on the alleged basis of international law or any other basis he may choose to adopt, what proportion of said indebtedness and of the interest accrued thereon *should in equity be apportioned* to and be *now* paid by the State of West Virginia. (See Kimberly vs. Armes, 129 U. S., 512). West Virginia says to this

That she thinks herself entitled to have the question whether or not the special agreement as to what shall constitute a just proportion of the debt solemnly entered into between the two states is binding, determined at this juncture *by the Court* and that, if it be held to be a binding agreement, Virginia is entitled to no accounting with West Virginia in this suit for her equitable proportion of the debt of the Commonwealth prior to January 1,

1861, *except under the terms of that ordinance, carried into the constitution.*

True, the decree proposed by the complainant directs that the master.

> "III. Make and return with his report any special or alternative statements of the account between the plaintiff and the defendant in the premises *which either* may desire him to state or which *he* may deem to be desirable to prevent to the Court."

This asks the Court to leave the determination of the pivotal point in the case, which we think should be decided by it in advance of an accounting, to a master, albeit only in an advisory way, and it gives West Virginia permission to have an accounting made, *if she desires* it, on the basis of the ordinance *at her own expense. She is defendant* here. In that event we would have two lines of investigation proceeding before the master at the same time, each entirely distinct in basic principle from the other, each burdensome in labor, expense and the consumption of time. Neither would throw any light upon the other. An exhaustive accounting under the ordinance would not aid the Court in determining whether it is *binding* and the only legal basis of settlement or not. An exhaustive investigation upon the international law basis would no more aid the Court in determining whether the ordinance is binding and therefore the sole ground upon which the liability of West Virginia to an accounting at all can be based. If the compact is in force, any accounting save under that will be not only burdensome, but superfluous. If both were made, upon what principle would the Court choose between them?

Upon general principles there must be a distinction, one would think, dealing with the general doctrine of apportionment, *in the absence of a special agreement* between a debt incurred by a state, before separation, in repelling invasion, *a debt which would be for the equal benefit of all its inhabitants,* and a debt incurred, as was the *entire* debt of Virginia prior to the first day of January, 1861, for *works of internal improvement.* If the proceeds of such a debt were all expended in the territory of the original state, there would seem to be no equity in requiring the new state erected out of a portion of its territory to be saddled with any portion of the debt, for the reason that the improvements for which the debt was

incurred would be owned by and remain entirely within the limits of the original state. Upon the other hand, if a portion of the debt were expended in improvements within the boundaries of the newly erected state, it would seem that upon separation, as such *improvements would be local* and the old state would be deprived of her property in them and the new state would become the proprietor and beneficiary by virtue of the separation *in the absence of a special agreement*, she should, in equity, contribute their cost or value to the payment of the debt of the original state. And this was the theory of the Ordinance.

In this case it is alleged in the bill that the larger portion of the indebtedness for internal improvements, for which the debt was incurred, were constructed within the state of Virginia, but it is alleged, generally, that several millions were expended in constructing improvements within the territory of the new state of West Virginia. All this, manifestly, must have been taken into account in the framing of the ordinance. All the local improvements which were constructed in what is now Virginia remain in Virginia, of course ; and those which were constructed in what is now West Virginia were fixed within her borders. It is alleged in the bill :

> " That the completion of some of the main lines of improvement beyond the said range toward the Ohio River since the first of January, 1861, has increased to a very great and material extent the values of real estate, including coal and timber, in the said territory now included in West Virginia, thus carrying into effect the original scheme of improvements which could not have been had not the lines east of said range been first constructed."

But it must be remembered, *first*, that these internal improvements which have been completed within the territory, now West Virginia since January 1st, 1861, have been completed without expense to Virginia, and for that she is entitled to no credit. *Second*, Obviously, the completion of such works to a connection with the railroads and other means of transit in Virginia, has enhanced the value of the improvements local to Virginia constructed with the proceeds of said debt, by increasing the business over them. The allegations of the bill, that these improvements in Virginia, which began in 1820, were mainly with a view to ameliorating the condition of the people of West Virginia, and for their benefit are not

issuable allegations, but they are denied by the answer. They are easily pleaded, but they afford no basis upon which the Court can enforce a liability upon West Virginia. Whatever element of fact there is in the allegation was well known to the government of Virginia when the Wheeling ordinance was adopted, and undoubtedly entered into the proposition embodied in Section IX.

It is said in the brief for complainant by way of objection to Paragraph 2 of the decree proposed by defendant :

> " We respectfully object to paragraph 2 of defendant's draft, on the ground that it seems to lend the sanction of the court in advance to a basis or scheme for the statement of account, which is not shown by anything *as yet* in the cause to be either equitable or just.
>
> " Before any such question can be fairly adjudicated, it is necessary to the ends of justice, that there shall be a mass of evidence in the case, not yet introduced, which evidence the court should have the aid of its Master in collating and thoroughly digesting."

In reply to this we have to say that *all that can be shown*, bearing upon the question whether the ordinance, and its acceptance and incorporation into the constitution with the consent of Congress, is the measure of liability assumed by West Virginia in agreement with Virginia *is already in the case.* No evidence can throw any light upon it. It raises a question of law pure and simple; evidence or aid by a Master are not necessary to its determination. The facts are not only undisputed and indisputable, but they are documentary, and are alleged in the bill and admitted by the answer. If the court is of the opinion that it is the basis agreed upon between the two states, it certainly is not for the court to determine whether the agreement *ought*, or *ought* not, *to have been made between the states.* Whether it would, from the standpoint of to-day, a just or equitable basis, is beside the question, which is: Is it the basis agreed upon? It is also said :

> " There is by no means enough in the record to enable the court to come to any just or definite conclusion as to the precise scheme which it would be *equitable* to adopt in stating the account.
>
> " To do so at this stage of the litigation would be to decide an important question in the case before the evidence for a full understanding and just decision of that question is

before the court. It would be largely to take a step in the dark, which might, and in all probability would, do injustice to one party or the other.

"Our *main* objection to *paragraph 2* of defendant's draft is that its effect manifestly is to have the court *prejudge* the case as to the *basis* upon which the *account shall be stated.*"

All this means but one thing, and that is, that the court shall take a mass of testimony in order to enable it to determine whether or not *it will set aside the compact between the two states.* We take this to be an impossible proposition. Of course it is not possible to determine now what the result of an *accounting*, on the basis of the ordinance, will be, if such an accounting is had. The records archives and papers bearing upon it, for the most part have been in the continued custody of the complainant, and were not open, upon reasonable request many years ago officially preferred, by the Commissioners appointed by West Virginia authorized to state the account. It seems to be the notion of the learned counsel that the court will feel itself at liberty to enforce the ordinance as the basis of accounting, or set it aside and resort to the alleged international law basis, according as *testimony* shall be furnished as to whether it *was equitable or otherwise.* We do not understand that to be within the province of the court upon the allegations of this bill and the conceded facts in this case. It involves no pre-judgment. It is simply what occurs in such cases generally that the court will have decided where upon the pleadings and other exhibits it is able to do so, upon the *principle which shall govern the accounting.* There is no allegation in the bill that the proposition made by the restored government of Virginia, defining the just proportion of the debt to be assumed by the new state, was not advisedly made. There is no allegation of fraud or overreaching, and if there were it comes over forty years too late. It must not be forgotten that this proposition, which was accepted by West Virginia, was a proposition *made by Virginia*, and that the *acceptance* of it was a *condition* upon which *she gave her assent* to the *erection of the new state out of her territory.* It is not for her to ask the court to aid her in repudiating it. It must be borne in mind, too, that the fairness of the agreement is to be considered, if it were an open question, without reference to the condition of either party at this day but with reference solely to the condition of both in 1861 when the ordinance was adopted.

Probably it is true that with the development of West Virginia, which has come about through the lapse of years, the increase of her population, the expenditure of vast sums in transportation facilities, in mining and other operations, and the general exploitation of her resources, Virginia would not be willing to make the proposition which she did make a half century ago. But when one thinks of West Virginia as she was then, with her undeveloped resources, with scant transportation facilities and population, it will be quite apparent that the agreement in her then condition was at least a fair one. If it is open to criticism at all, it is that it is unfair to West Virginia. True, Virginia has suffered; she was through four years of war a battleground; her people were largely withdrawn from their vocations of peace; her agriculture languished; her commerce was paralyzed and much of her property destroyed by contending armies. But the people of West Virginia, who adhered to the Union and helped to rescue the government of their state and to bring it into harmony with and support of the government of the United States are neither to blame for it nor should they be compelled to pay for it. West Virginia likewise suffered from her proximity to the theatre of war. Counsel add:

> "It is submitted for a decree referring it to a Master, to state and report to the court the data necessary to enable the court to justly decide it upon its *merits*—and all the complainant desires *is an opportunity to show to the court and its Master what is the fair and equitable basis upon which the account between the two states should be stated, under all of the circumstances of the case, as they shall appear when the evidence is all in.* If it should *then appear* that the *basis prescribed by the Wheeling ordinance is binding upon the parties* and *must be followed as the basis upon which the account shall be made up, that basis would be adopted.* But if it should be then manifest that that arbitrary basis of settlement is not the one on which the account should be stated, because it would, if applied to the facts of the case as they shall appear in the evidence, lead to absolutely unconscionable results and operate to *impair the obligation of the contracts by which the common debt was created*, contracts which were and are alike obligatory upon Virginia and West Virginia, or for any other valid reason, then the scheme of settlement indicated in the Wheeling ordinance would have to be discarded, and an equitable basis and scheme of settlement adopted."

This, too, is but a restatement by counsel, in different language, of the proposition that it is for the court to take testimony through a Master, to determine what *would be a just and equitable basis* of settlement between Virginia and West Virginia, the agreed basis, or the assumed international law basis. This is plainly calling upon the court to ignore the ordinance as a binding agreement, notwithstanding the solemn statement of the Attorney-General on the argument as to its binding force and contractual character. This, it seems to us, is impossible.

What is meant by the suggestion that the ordinance may be held to be *unconstitutional* because it *impairs* the obligation of contracts by which the common debt was created, "contracts which were and are alike obligatory upon Virginia and West Virginia," is difficult for us to understand. It is easy to see that it begs the question, for it assumes the indebtedness of Virginia prior to January 1st to be contracts which are binding alike upon Virginia and West Virginia. The personal identity or individuality of Virginia as a state which issued the bonds and owed the debt was not at all affected by the separation of West Virginia from her and her erection into a new state. It would have been entirely competent for Virginia to have agreed with West Virginia that she would not be liable to assume any portion of the debt of Virginia as it existed prior to the first day of January, 1861. It would not have impaired the obligation of any contract, just as it was competent for the United States to enter into an agreement with Texas that she should pay her own debt, consisting of several millions of dollars, incurred before she was received into the Union.

The writers on international law are unanimous as to the validity of agreements between nations, under similar circumstances, as to the apportionment of indebtedness accrued before a separation. It is needless to again quote or cite them:

Counsel say further by way of objection to paragraph second of the decree proposed by the defendants:

> "While it is believed upon the facts stated in the bill and the accompanying exhibits and upon the proofs hereafter to be adduced in support thereof that West Virginia will owe a very large sum under the arbitrary scheme of the Wheeling ordinance, we submit that we should not in the present status of that litigation be *tied down to the terms of that ordinance.*"

If it is binding upon the two states, why should not both parties be "tied down to the terms of that ordinance?" It will be observed by the Court that no argument is made that it is not binding and that no reason is given why it should not be binding and enforced. Indeed it is insisted upon in the Bill as an irrevocable Compact.

Counsel add:

> "Indeed, its provisions were modified by the terms of the eighth section of Article VIII. to the State Constitution, under which West Virginia was made a state, which provided that West Virginia should assume an equitable proportion of the common debt of the Commonwealth, *principal and interest*, and yet the defendant's draft excludes any item of interest from the account."

Section 8 of Article VIII. of the first West Virginia constitution *did not* assume the payment of *any interest upon the debt of Virginia as it existed prior to the 1st day of January, 1861.* It is brief, we repeat it:

> "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, shall be assumed by this State."

The above words constitute all there is in the Constitution by way of *assumption of liability for indebtedness.* If there was unpaid interest due January 1, 1861, that would be a part of the debt of the Commonwealth of Virginia then existing, an equitable proportion of which was assumed by this constitutional provision. After assuming an equitable proportion of the debt, Article VIII. laid a command upon the *legislature:*

> "* * * to ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

This injunction for reasons which appear in the case was not observed. There was no agreement to assume an equitable proportion of the *interest* on the *debt* which *might accrue after January 1, 1861.* The Constitution shows that it was in the contemplation of its framers that the new State, confessedly sparsely settled and undeveloped, would require time for the discharge of the equitable proportion of the *debt* so *assumed* when it should have been *ascertained*, and it was provided that the legislature should make pro-

vision for the liquidation of the *debt so assumed*, when ascertained, by a sinking fund to pay the *interest* accruing on the *debt so ascertained* and *assumed* by West Virginia, and to pay the principal of the *debt so ascertained* and *assumed* within thirty-four years.

The thirty-four years have expired. The constitutional provision has been omitted. The provision as to ascertaining the indebtedness and providing for its liquidation, etc., within thirty-four years was outside of the constitutional *assumption* of an *equitable proportion of the debt* of the Commonwealth of Virginia, as it existed prior to January 1, 1861. It was no part of the ordinance which was carried into the Constitution, and fulfilled by the specific assumption of an equitable proportion of the debt. The ordinance had made no provision as to the tribunal by which the debt should be ascertained, nor did it contain any provisions as to its payment, after its ascertainment. The assumption of the debt was a literal acceptance and fulfillment of the requirement of Section 9 of the ordinance, to be ascertained as therein provided. If Article VIII. had stopped there, it would, so far as the obligation of West Virginia to Virginia was concerned, have been complete; it would have constituted, as it does constitute, a compact for the assumption and payment of an equitable proportion of the debt of the Commonwealth of Virginia as it existed prior to January 1st, 1861. If the requirement that the Legislature should "ascertain" the amount and provide for its payment, principal and interest, within thirty-four years, had been carried out and bonds issued therefor, the bonds might have been delivered to Virginia for distribution among her creditors and would have borne interest; or they might have been sold by West Virginia, and the cash proceeds paid to Virginia for distribution among her creditors. Either method was open under section 8 to the legislature and so, when there shall have been an accounting under the ordinance and an ascertainment thereby of what is the equitable proportion of the debt as it existed prior to the date of January 1, 1861, assumed by West Virginia, the legislature of West Virginia is perfectly free as to the manner in which the obligation shall be discharged. It would not be obliged to issue bonds for thirty-four years, that provision of the Constitution having been omitted in the revised Constitution. *It might do so if it chose.* It might provide for the issue of bonds due in 100 years, or 20 years. It is at liberty to fix the

rate of interest which the bond shall bear at 2 per cent. or 3 per cent. or 4 per cent. It could provide for the delivery of the bonds to West Virginia in discharge of her obligation to that Commonwealth, if acceptable to her, or she could borrow the money on her bonds at a low rate of interest and discharge the debt to Virginia *in money*. That would be a "debt contracted" under section 5 of the Constitution for the *redemption of a previous liability*, and in nowise a modification of or departure from the ordinance or the contract of assumption made irrevocable by the adoption of section 8 of the first Constitution. She made no covenant to pay interest upon the debt of Virginia but she did provide for the payment of interest upon the proportion which she assumed upon its ascertainment, until the amount should be paid to the State. But whether she should pay interest or not, is a question which it is not necessary to determine at this time through a Master or otherwise. In any event, it is very difficult to see what testimony could be taken before a Master which would aid the Court in determining the *liability* of the defendant *to pay interest*.

Under Point III., the learned Attorney General objects to the second paragraph of the decree proposed by the defendant also upon the ground that it excludes from the account the *value of the property, assets and money which West Virginia is alleged to have received from the Commonwealth* of Virginia by grants contained in the *acts of February 3 and 4, 1863*. The learned Attorney General says that these acts were passed, as we understand him, "before the legislature of Virginia had in any form given its consent to its (West Virginia) creation out of the territory of Virginia". In this he is certainly in error. It has been our understanding that the claim of Virginia, for which an accounting is sought in this case, is restricted by the court to an accounting which shall ascertain the equitable proportion of the debt of the Commonwealth of Virginia, prior to January 1, 1861; but be this as it may, the argument of the learned Attorney General is extraordinary.

It is said that upon the basis of the ordinance alone none of the property embraced by the grants contained in the acts of February 3 and 4, 1863, would have passed to the State of West Virginia; and on page 6:

> "By the terms of that ordinance Virginia's title to ownership of all the property and assets theretofore belonging to the Commonwealth remained intact. By it West Virginia would acquire no title to any of these assets or of that prop-

> erty. Framed as that ordinance was, by West Virginians, and arbitrary on its face, unjust as were the *criteria* by which it undertook to provide that West Virginia's proportion of the common debt should be computed, its authors were not so conscienceless as to also propose that the new State, after making such an inadequate contribution to its share of a debt, which had been chiefly contracted by the votes of the representatives of its people and for their benefit, should also have a share of the property and assets of the Commonwealth free of charge.
>
> "All that was by the terms of that ordinance to be ceded by the Commonwealth to the new State was political dominion and jurisdiction over the people and territory embraced in the new State."

To this we do not agree. There is nothing in the terms of the ordinance which affirms Virginia's title to and ownership of all the property and assets theretofore belonging to the commonwealth of Virginia, or of any thereof located in the territory of the proposed new state. Virginia consented to the erection of West Virginia into a new State, out of her territory. She did not *grant sovereignty* to the new State. There could not be a new State without sovereignty, and when she gave her consent to the erection of the new State, it was accompanied by all the rights and powers which upon principles of international law would follow the territory and inhere in the sovereignty of the new State over the territory within her borders. The ordinance contained nothing upon the subject. The ordinance did provide—as such ordinances have always provided:

> "SECTION 9. All *private* rights and interests in lands within the proposed State derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed State and shall be determined by the laws now existing in the State of Virginia. The lands within the proposed State of non-resident proprietors shall not in any case be taxed higher than the lands of residents therein. No grants of land, or land warrant issued by the proposed State, shall interfere with any warrant issued from the Land Office of Virginia prior to the 17th day of April last which shall be located on lands within the proposed State now liable thereto."

By Section 1 of the ordinance it is declared:

> "The people of Virginia, by their delegates assembled in convention at Wheeling, *do ordain that a new State*, to

be called the State of Kanawha, be formed and erected out of the territory included within the following described boundary, to-wit: * * *"

And there is not a word in the ordinance in regard to what should be possessed by the new State of West Virginia, nor a *single reservation* in *the ordinance of assets or property of any kind to the commonwealth of Virginia.* What passed to the State of West Virginia by the separation was what would have passed had Virginia been a nation and a portion of her people had, by revolution, separated themselves from her sovereignty and formed of the people and the territory an entirely distinct and new nation called West Virginia; and what would be possessed by the new nation out of what had been possessed by the old one, would be measured entirely, *in the absence of special agreement,* by the settled principles of international law. It is needless to cite authorities. As Mr. Hall says (p. 79):

> "And as the old State continues its life uninterruptedly, it possesses everything belonging to it as a person which it has not expressly lost; so that property enjoyed by it as a personal whole, or by its subjects in virtue of their being members of that whole, continues to belong to it. *On the other hand, rights possessed in respect of the lost territory,* including rights under treaties relating to cessions of territory, and demarcations of boundary, *obligations contracted with reference to it alone* and *property which is within it and which has therefore a local character,* or which, *though not within it, belongs to State institutions localized there, transfer themselves to the new State person.*"

Again he says:

> "Property which becomes transferred by the fact of separation consists in domains, public buildings, museums and art collections, communal lands, charitable and other endowments connected with the State, and the like."

State banks, which are State institutions and local in their nature, certainly belong to the new State created after a forcible secession. The same result would follow from an agreed dismemberment, unless the property in them were reserved. The same would be true of railroads and all proprietary interests of the old State *local to the new State.* Section 9 of the ordinance indus-

triously safeguards all *private* rights and interests in lands within the proposed new State and their titles; but we repeat, it is silent as to *public interests* and *ownership* of the old State *located within the borders of the new.*

All that Virginia required in a financial way of the new State was that she should—

> "take upon herself a just proportion of the public debt of the commonwealth of Virginia prior to the 1st day of January, 1861, by charging to the defendant all stated expense within the limits thereof and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted and deducted therefrom, the moneys paid into the treasury of the commonwealth from the counties included within the said new State during the same period."

Expressio unius est exclusio alterius.

Possibly, these grants were made in February, 1863, mainly to afford a ground for the claim that the property which had passed by the separation should be "accounted for in the settlement hereafter to be made." The learned counsel contends—as he is obliged to contend, we think, to give any plausibility even to his proposition—that the *statutes of February 3d and 4th, 1863,*

> "*together with the Wheeling ordinance*, the *first Constitution of West Virginia*, the Act *of the United States Congress, approved December 31, 1862*, under which the new State was afterwards admitted into the Union, and the act of the Wheeling legislature of May 13, 1862, constitute the constating instruments and acts by which her political existence was created and her governmental powers and duties determined."

And he adds:

> "As was indicated by this court in its decision overruling the defendant's demurrer, the Wheeling ordinance and Section 8 of Article VIII. of the first Constitution of West Virginia must be taken and read together; *so, also*, these constating acts of February 3 and 4, 1863, and particularly of February 3, 1863, *must be taken and read together with Section 9 of the Wheeling ordinance, and with Section 6 of Article VIII. of the first West Virginia Constitution, as together prescribing the terms and conditions on which the consent of the commonwealth was given to the formation of the new State out*

of her territory, and the transfer to that new State, when formed, of any portion of the assets and property of the parent State."

The court does say in the opinion overruling the defendant's demurrer, "Reading the Virginia ordinance and the West Virginia Constitution, in *pari materia*, it follows that what was meant by the expression that the legislature "shall ascertain" was that the legislature should ascertain as soon as practicable the result of the pursuit of the method prescribed and provide for the liquidation of the amount so ascertained." True this was said in deciding adversely to the contention that the admission of the State under the ordinance and Section 8 of the Constitution, with the consent of Virginia, created a *compact which gave to the legislature of West Virginia power of final ascertainment of the equitable proportion of the public debt of Virginia prior to January 1st, 1861, assumed, as provided in the 9th Section of the ordinance.* But there can be no question of the correctness of the proposition above quoted from the opinion. We dissent altogether from the suggestion of counsel that the acts of February 3d and 4th, 1863, are to be taken and read with Section 9 of the Wheeling ordinance and with Section 8 of Article VIII., of the first West Virginia Constitution,, *as together prescribing the terms and conditions on which the consent of the commonwealth was given to the formation of the new State out of her territory.* This proposition is entirely untenable. The Wheeling ordinance was adopted August 20th, 1861. The Constitutional Convention assembled in November, 1861, and framed the Constitution which was thereafter duly ratified by a vote of the people, which Constitution contains Section 8, assuming an equitable proportion of the debt. *On the 13th of May, 1862,* an act was passed by the legislature of Virginia giving the consent of that State to the formation and erection of the proposed new State within the jurisdiction and territorial limits of said State of Virginia, Section 1 of which is as follows:

> "That the consent of the legislature of Virginia be and the same is hereby given to the formation and erection of the State of West Virginia within the jurisdiction of this State, to include the counties of Hancock, Brook and Ohio (and many other counties), according to the boundaries and under the provisions set forth in the constitution of the said

State of West Virginia and the schedule thereto annexed proposed by the convention which assembled at Wheeling on the 26th day of November, 1861."

Section 3 said act provided :

"Be it further enacted That this act shall be transmitted by the executive to the senators and representatives of this Commonwealth in Congress, together with the certified original of the said Constitution and schedules, and the said senators and representatives are hereby requested to use their endeavors to obtain the consent of Congress to the admission of the State of West Virginia into the Union."

It ought here to be stated that the Constitutional Convention of West Virginia appointed three Commissioners to that end also that the Commissioners presented on May 31, 1862, to the United States Senate a memorial praying for the admission of that State into the Union, addressed to the Hon. B. F. Wade, Chairman of the Committee on Territories, in which they gave a history of the proceedings which led to the organization of the restored government of Virginia, and which *included at length the ordinance adopted on the 20th of August, 1861, by the Convention at Wheeling entitled "An ordinance to provide for the formation of a new State out of a portion of the territory of this State", which, on the 31st day of May, 1862, was referred by the Senate to the Committee on Territories and ordered to be printed* (Congressional Globe, p. 2451 ; 37 Cong., 2d Session, Misc. Senate Doc. No. 99), thus *clearly demonstrating that Congress had before it not only the Constitution of West Virginia, but the Wheeling ordinance in full.*

On the 31st day of *December, 1862,* an act was passed by the 37th Congress providing that the new state, thus formed in pursuance of the ordinance of the Wheeling convention above referred to, should, upon a certain condition, be admitted into the Union by the name of West Virginia, with the Constitution which had theretofore been adopted by the new State and by the people thereof; said condition being that a change should be made in the constitution of the proposed State in regard to the liberation of slaves therein. And it was provided by the act of Congress that whenever the President should issue his proclamation stating the fact that such change had been made and ratified, *thereupon the act admitting the*

new State into the Union should become effective 60 days after the date of uch proclamation.

The proclamation was duly issued by President Lincoln on the *20th day of April, 1863*, and on the *20th day of June, 1863*, West Virginia became a state and fully organized as one of the States of the Union.

Prior to the passage, it will be observed, of the acts of February 3 and 4, 1863, the general assembly of Virginia *had consented* to the admission of West Virginia under the Constitution adopted by her people and had requested her admission, and *Congress had admitted her under that Constitution with the single condition* that *a should change be made in it relative to the liberation of slaves, which was made.* And we deny that it was in the power of Virginia *after the action of Congress* to withdraw her consent to the admission of West Virginia or to change the terms of her consent, Congress not having required as a condition of her admission any *change in the ordinance* adopted by the Wheeling convention or in the Constitution *in anywise affecting the provisions of the ordinance.*

Virginia could not thus play fast and loose with Congress in respect of her consent to the admission of West Virginia. This proposition has been sustained by this Court in *Virginia vs. West Virginia*, 11 Wallace, 39.

It cannot be supposed that after Congress had passed the law admitting the state of West Virginia into the Union upon the conditions indicated and authorizing President Lincoln to issue the proclamation announcing a compliance with the condition, that a *specific withdrawal by Virginia of her consent to the admission of the new state into the Union would have been of any force.* If this be a correct proposition, it necessarily follows that no modification of the consent theretofore given upon which Congress had acted and *after Congress had acted on the faith of her prior consent*, would be of any efficacy. The proposition of the learned counsel must have for its predicate the assumption that after Congress had passed the act for the admission of West Virginia and up to the time President Lincoln issued his proclamation declaring the condition imposed by Congress to have been complied with, the General Assembly of Virginia possessed the power to withdraw her consent or to modify it as she might see fit. If she could withdraw it, she could modify it. She could change its terms and impose other conditions. *Prior to February, 1863*, West Virginia *had been admitted into the Union*

upon a condition subsequent. The act was complete. Congress simply suspended the taking effect of the act until sixty days after the proclamation of the President that the condition had been complied with. The argument places the acts of February 3 and 4, 1863, upon precisely the same basis, which it is conceded that the Wheeling ordinance of August 20, 1861, and the constitution of 1861 stand. It is probable that Virginia might have withdrawn her consent to the formation of the new state at any time before the acceptance of the proposition proffered by the ordinance, by the convention which framed, adopted and submitted for ratification the constitution of 1861. That she could ~~not~~ do it afterwards and before the action of Congress is subject to grave doubt, although it is academic, since she *did not attempt to do so.*

The counties of Berkeley and Jefferson involved in the case of Virginia vs. West Virginia, *supra*, were by the ordinance authorized to be incorporated in West Virginia upon the condition that a majority of the votes of the counties were cast in favor of becoming a part of West Virginia. The convention by the constitution made provision for their being incorporated. By act afterwards Virginia renewed her consent by legislation. The *vote* was no *taken by the counties until after the state had been admitted into the Union* and by that time *and before the vote was taken Virginia had repented and had passed an act witdrawing her consent ;* and, to test the question whether these counties had become a part of the State of West Virginia, the suit of Virginia vs. West Virginia was brought in this Court. The Court said :

> "Now, we have here on two different occasions the legislative proposition of Virginia that these counties might become part of West Virginia, and we have the *constitution of West Virginia agreeing to accept them* and providing for their place in the new-born state. There was one condition, however, imposed by Virginia to her parting with them and one condition made by West Virginia to her receiving them, and those conditions were the same, namely, the assent of the majority of the votes of the counties to the transfer. It seems to us that here was an agreement between the old state and the new that these counties should become part of the latter, subject to that condition alone."

Again, as to Congress having assented, the Court says :

> "It is therefore an inference clear and satisfactory that Congress by that statute (referring to the act of admission)

intended to consent to the admission of the state with the contingent boundaries provided for in its constitution and in the statute of Virginia, which prayed for its admission on those terms and that in doing so it necessarily consented to the agreement of those states on that subject. There was then a valid agreement between the two states, consented to by Congress, which agreement made the accession of these counties dependent upon the result of a popular vote in favor of that proposition."

Mr. Justice DAVIS, with whom concurred Justices CLIFFORD and FIELD, dissented upon the ground, that Congress had not given its consent to the compact between the states for the transfer of Berkeley and Jefferson Counties to West Virginia until March 2, 1866, saying:

"If so, the consent came too late because the legislature of Virginia had on the 5th day of December, 1865, withdrawn its assent to the proposed cession of these two counties. This withdrawal was in ample time, as it was before the proposal of the state had become operative as a concluded compact, and the bill in my judgment shows that Virginia had sufficient reasons for recalling its proposition to part with the territory embraced within these counties. *But it is maintained in the opinion of the Court that Congress did give its consent to the transfer of these counties by Virginia to West Virginia when it admitted Virginia into the Union.*"

From this the learned justices dissented.

It is clear to our apprehension that whatever may be the opinion of the court as to the effect of the acts of February 3 and 4, 1863, it cannot be said that they had any effect whatever, qualifying or otherwise, upon the assent which Virginia gave in the ordinance and by the act of her legislature to the admission of the State of West Virginia into the Union, and if the Court shall be of the opinion that under the general public law which governs between nations, the property referred to in the acts of February 3 and 4 or either of them, passed by the acceptance of the ordinance and the conditional admission of the State by Congress upon the request of Virginia, the enactment of the acts of February 3 and 4, 1863, were not necessary as evidences of title, and *in no event could be anything more than that.* The learned Attorney General further says:

"It is objected to the draft of the proposed decree for the de-

fendant that it does not direct any account to be taken ascertaining the amount and proportion of the debt of Virginia on and prior to January 31, 1861, which West Virginia should assume and pay, but contents itself with merely directing the arbitrary and inconsequential accounts defined in paragraph second of defendant's proposed decree. This is an objection simply that the proposed decree of the defendant is upon a different theory from that proposed by the complainant. That this is true, is freely admitted. It was not intended by the draft that the Court should direct the Master to ascertain and report what *proportion* of the public debt of Virginia prior to the first day of January, 1861, West Virginia *ought to assume and pay*. That was settled by Virginia and West Virginia nearly fifty years ago. The latter was required to take upon herself a just proportion of the debt, and the two states agreed how that should be ascertained. The draft proposed by the defendant is in literal execution of the contract of the parties, as evidenced by the ordinance and section eight of the first constitution.

It directs the Master to ascertain and report:

(*a*) The amount of State expenditures made by the Commonwealth of Virginia prior to the 1st day of January, 1861, within the territory now included within the State of West Virginia, since any part of said indebtedness was contracted, as provided by the ordinance adopted by the Commonwealth of August 20, 1861.

We agree that the last clause need not be inserted.

(*b*) To ascertain the aggregate ordinary expenses of the State Government of the Commonwealth prior to January 1, 1861, and since any part of said indebtedness was contracted.

(c) All moneys paid into the treasury of the Commonwealth of Virginia from the counties included within the State of West Virginia during the said period.

The items *(a)* and *(b)* are, under the ordinance, to be *charged* to West Virginia.

The item *(c)* is under the ordinance to be *credited* to the State of West Virginia, and when these three steps shall have been taken, and the two items *charged*, and the one item *credited*, the *sum which it was agreed between the two States should constitute a just proportion of the debt of the Commonwealth of Virginia prior to January 1, 1861, which West Virginia assumed, will have been ascertained.* It is vain to refer to these as "arbitrary and inconsequential items."

They are the items which Virginia herself framed and required to be accepted by the proposed new State as a condition of assent to her separation and admission into the Union.

The entire debt of the Commonwealth of Virginia as it existed prior to January 1, 1861, *as averred in the bill*, and *admitted by the answer*, was contracted for, and its proceeds are alleged to have been expended in, the construction of a system of internal improvements, the greater part of which were expended in what is now Virginia, and several millions of which were, it is alleged by the Bill, and denied in the answer, expended in what is now West Virginia. It was just that Virginia should provide that there should be charged to West Virginia so much of the proceeds as were expended in the construction of internal improvements within her territory. It ought not to be very difficult to ascertain how much of the debt was expended for internal improvements within the limits of what is now West Virginia.

There is but one item in section 9—defining the manner in which the account should be taken in order to ascertain the proportion of the debt to be taken upon herself by the proposed new State—left at all indefinite, and that is item *(b)*, "'*a just proportion*' of the ordinary expenses of the State Government, since any part of said debt was contracted." This involves a determination of the basis upon which a "just proportion" of the aggregate ordinary expenses of the State Government during the said period is to be ascertained. Shall it be population or territory, or both, or taxable values? We are strongly of the opinion that it should be based upon population, since "government"—including the administration of justice, the making and administering of the laws, the education of the children through a system of common schools, academies and a State university, the maintenance of State institutions, the support of prisoners, the care of the insane and paupers, and the like—is for *people*, not *acres*. It is difficult to conceive of *government* except in its relation to *people*, and so, it has seemed to us that the basis must be population. We therefore suggest that there should be added to the draft proposed by the defendant, in respect of an ascertainment of the aggregate ordinary expenses of the State, a direction to the Master to find alternatively certain facts substantially as follows:

> "For the purpose of enabling the Court to determine the just proportion of the aggregate of the ordinary expenses of

the State Government of the Commonwealth of Virginia prior to January 1, 1861, and since any part of said indebtedness was contracted, said Master shall ascertain and report the population during the said period of the counties now constituting the Commonwealth of Virginia, and separately the population of the counties now constituting the State of West Virginia, as shown by the decennial censuses taking during the said period by the United States, and also the average population of Virginia during each of said periods of ten years."

The aggregate ordinary expenses being found, and the items suggested as to population, it will be easy to determine the "just proportion" if that is the proper basis.

We submit that this case should not be cast at large, with no definition of the principles to govern his action, into the hands of a Master; that at least it should be settled before a reference for the *purpose of taking an account*, whether the liability of Virginia to West Virginia is upon the *special agreement* which preceded and accompanied her admission into the Union, *or, because of the absence of a special agreement*, upon the basis of *population* and *territory*.

C. W. MAY,
Attorney General.

JOHN G. CARLISLE,
JOHN C. SPOONER,
CHAS. E. HOGG,
W. MOLLOHAN,
GEO. W. MCCLINTIC,
W. G. MATTHEWS,
Of Counsel for defendant.

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Office Supreme Court, U. S.
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APR 11 1908
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 3, Original.

COMMONWEALTH OF VIRGINIA, COMPLAINANT,

vs.

STATE OF WEST VIRGINIA.

MEMORANDUM FOR DEFENDANT.

It will be observed that in paragraph II of this draft of a decree the master is not only directed to ascertain the amount and proportion of said indebtedness, but "of the interest accrued thereon."

Counsel for the defendant object further to this paragraph because there is no legal ground for directing the ascertainment of interest. The State of West Virginia has not obligated herself in any manner for the payment of interest. The principle is well settled that a State is not liable to pay interest unless it has expressly contracted to do so.

In support of this proposition this court, in United States *v.* North Carolina, 136 U. S., 211, said:

"A state is not liable to pay interest on its debts, unless its consent to do so has been manifested by an act of its legislature, or by lawful contract of its executive officers."

Following the principle thus announced by this court, many of the State courts have laid down in distinct terms the same proposition. Among the decisions of these courts are the following:

Sawyer *v.* Colgan, 102 Cal., 293; 36 Pac., 583.

Hawkins *v.* Mitchell, 34 Fla., 421, 422; 16 So., 316.

Molineux *v.* State, 109 Cal., 380; 50 Am. St. Rep., 50; 42 Pac., 34.

Flint, etc., R. R. *v.* Board of State Auditors, 102 Mich., 502; 60 N. W., 971.

Carr *v.* State, 127 Ind., 204; 22 Am. St. Rep., 624.

In Carr *v.* Sate, 127 Ind., 204; 22 Am. St. Rep., 624, this principle is announced as one of the points decided:

"A sovereign State is not bound to pay interest unless it has contracted to do so."

The court, in the course of its opinion in this case, says:

"In the case of State *ex rel. v.* Board, etc., 36 Ohio St., 409, it was held that in the absence of a promise to pay interest none can be recovered against a State, and that a State is not within the provisions of a general statute providing for the payment of interest in cases where money is wrongfully withheld from a creditor. The court put its decision upon the familiar rule that a sovereign is not bound by the words of a statute unless it is expressly named, and in support of its conclusion cited these cases: Trustee, etc., *v.* Campbell, 16 Ohio St., 11; Joselyn *v.* Stone, 28 Miss., 753; State *v.* Kinne, 41 N. H., 238; Attorney-General *v.* Cape Fear, etc., Co., 2 Ired. Eq., 444; Auditorial Board *v.* Arles, 15 Tex., 72; State *v.* Thompson, 10 Ark., 61. In Wightman *v.* United States, 23 Ct. of Cl., 144, the general rule was stated, and it was said: 'Hence there is no law fixing a rate of interest for all classes of the public debt, and a long-established public policy has been to pay interest only where it is a subject of express agreement or of positive enactment.' It was held in the case of Tillson *v.* United States, 100 U. S., 43, that a statute referring a claim did not authorize a recovery of interest, in the absence of words expressly providing for

the payment of interest. It is impossible to escape the effect of these authorities, and considerations may be readily suggested which increase their force. One is, that there is no right to coerce the payment of a debt due from a sovereign, and, of course, a sovereign may impose limitations upon its liability."

In a note appended to this case as reported in 22 American State Reports, at page 448, we find the following:

"With respect to the obligation of the State to pay interest upon its indebtedness, the principal case is well established by other authorities upon the same subject. In nearly and perhaps all of the States there are statutory provisions providing that moneys, after they become due, shall, in the absence of express contract to the contrary, bear the rate of interest specified in such statutes; but, acting under the old common-law rule that the king or sovereign is not bound by a statute unless expressly named therein, it has been uniformly held that these statutory provisions respecting interest did not apply to any obligation either of the State or of the national government, and therefore that interest is never allowed upon such obligations, in the absence of some special statute clearly manifesting the intention of the sovereign to be bound for the payment of interest upon the particular obligation or class of obligations under consideration (United States *v.* North Carolina, 136 U. S., 211; State *v.* Thompson, 10 Ark., 61; State *v.* Board of Public Works, 36 Ohio St., 409; State *v.* Bank of Washington, 18 Ark., 554; United States *v.* Sherman, 98 U. S., 565; United States *v.* Bayard, 127 U. S., 251; Tillson *v.* United States, 100 U. S., 43; *In re* Gosman, 17 Ch. Div., 771; Attorney-General *v.* Cape Fear N. Co., 2 Ired. Eq., 444; Bledsoe v. State, 64 N. C., 392; Trustee *v.* Campbell, 16 Ohio St., 11; Joselyn *v.* Stone, 28 Miss., 753; Wightman *v.* United States, 23 Ct. of Cls., 144)".

J. G. Carlisle.

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JAMES H. McKENNEY
Clerk

SUPREME COURT OF THE UNITED STATES.

No. 2 ORIGINAL—OCTOBER TERM, 1907.

COMMONWEALTH OF VIRGINIA, Complainant,

vs.

STATE OF WEST VIRGINIA, Defendant.

Now cometh the defendant, the State of West Virginia, by her counsel of record, and in pursuance of the order of this Court entered on the 4th day of May, 1908, doth respectfully submit the names of the persons hereinbelow set out, either of whom as the defendant believes and avers, would be a fit person for the appointment as Master to take the testimony under the decree in this cause entered on May 4th, 1908, to-wit:

Mr. John W. Yerkes, of Kentucky;

Mr. Charles E. Littlefield, of Maine.

We respectfully say to the Court that in the selection of these names we have deemed it proper and right not to consider any citizen of the Commonwealth of Virginia or of the State of West Virginia or of the Cities of New York, Philadelphia, Baltimore, or any of the other money centers where the so-called "West Virginia Certificates" are owned, or are sold or traded in, on stock exchanges or exchanges of a similar nature.

Respectfully submitted,

W. G. CONLEY,
Attorney General.

JOHN G. CARLISLE,
JOHN C. SPOONER,
CHAS. E. HOGG,
W. MOLLOHAN,
GEO. W. MCCLINTIC,
W. G. MATHEWS,
Of Counsel for defendant.

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Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

IN EQUITY. ORIGINAL, No. 2

THE COMMONWEALTH OF VIRGINIA

v.

WEST VIRGINIA.

BRIEF IN SUPPORT OF MOTION TO MODIFY DECREE OF REFERENCE.

W. G. CONLEY,
Attorney General.

J. G. CARLISLE,
JOHN C. SPOONER,
CHAS. E. HOGG,
W. MOLLOHAN,
GEO. W. McCLINTIC,
W. G. MATHEWS,
Of Counsel for Defendant.

UPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

IN EQUITY. ORIGINAL, No. 4.

THE COMMONWEALTH OF VIRGINIA

v.

WEST VIRGINIA.

BRIEF IN SUPPORT OF MOTION TO MODIFY DECREE OF REFERENCE.

Paragraph 2 of the decree of reference entered herein on e 4th day of May, 1908, directed the special master to certain—

> "2. The extent and value of the territory of Virginia and of West Virginia June 20, 1863, and the population thereof, with and without slaves, separately."

As a substitute for this the defendant proposes the following:

> "2. The *territorial area* and *assessed valuation* of the States of Virginia and West Virginia June 20, 1863, and the population thereof, with and without slaves, separately *stated, including in the latter State the counties of Berkeley and Jefferson.*"

We respectfully submit that unless the official assessments the territory and slaves in both sections of the State are

made the basis of the valuation by the master, it will be impossible for him to comply with this part of the decree in a manner satisfactory to the court or the parties. Forty-five years have elapsed since the date fixed in the decree for the valuations, and it is scarcely possible that witnesses can now be produced whose testimony upon the subject will be conclusive or satisfactory. Moreover, the introduction of parol evidence to prove values as they existed forty-five years ago, in a State consisting of more than 60,000 square miles of territory and containing many thousands of slaves, would necessarily prolong the investigation to an unreasonable extent and subject the litigants to a very large and, we think, useless expense. At best, the witnesses could only state their opinions, and upon such a subject they would differ so widely that it would not be possible to reconcile them so as to reach a satisfactory conclusion. The decree provides:

> "All public records published by authority of the Commonwealth of Virginia prior to the 17th day of April, 1861, and all papers and documents and other matter constituting parts of the public files and records of Virginia prior to the date aforesaid, which in the judgment of the master may be relevant and pertinent to any of said inquiries, or copies thereof, if duly authenticated, may be used in evidence and considered by the master, but all such evidence shall be subject to exceptions to its competency. The public acts and records of the two States since the admission of West Virginia into the Union shall be evidence, if pertinent and duly authenticated, but all such evidence tendered by either party shall be subject to proper legal exceptions to its competency."

The authentic official evidence thus provided for in the decree would seem to be sufficient to secure a reasonable degree of accuracy in the valuations ordered to be ascertained by the master without encumbering the record and protracting the investigation by the introduction of unreliable opinions, which must, under the circumstances, be mere guesses.

The assessments are parts of the public records of the State and constituted the basis of taxation in both sections, and their accuracy ought not to be impeached at this late day by the mere opinions of witnesses based upon their recollections of the situation as it then existed. These opinions as to the value of the territory of West Virginia would be largely influenced by the developments of her mineral and other resources and the internal improvements made in that State since 1863, and the testimony would be quite different from what it would have been if it had been taken at that time. It was then known, as is alleged in the bill, and was known when Virginia began to create the debt, that these resources existed, and it is to be presumed that the officials in assessing the value of the land took them into consideration. Most of the land was not arable and was valuable mainly, if not entirely, because of the forests and minerals. It would be manifestly unfair to West Virginia to receive as evidence, for the purpose of increasing the valuations, the mere opinions of witnesses as to the values of gas, coal, iron, and timber separately from the land in which the minerals were deposited or on which the timber was grown, and then add that value to the assessment which already included them. It is stated in the brief filed for Virginia on this motion that these minerals and other resources were not included in the assessments "as distinct subjects of valuation;" but it is said "their presence was considered in estimating the value of land in transactions between vendor and vendee," and that the property was assessed at two-thirds its value. That would be, we suppose, at two-thirds of its market value, including, of course, the minerals and other resources. The same rule of assessment prevailed in both sections of the State, and therefore the relative proportions which the value of property in one section bore to the value in the other would be precisely the same as if it had been assessed at its full market value.

If the assessments are not to govern, what is to be the test of value? It would be impracticable to prove the market

value of the land and slaves in 1863, but if assessed values are to be ignored or contradicted, we know of no other test except market value that could be properly applied.

For two years prior to June, 1863, a large part of the territory which now constitutes the State of Virginia was occupied by the two armies, and not only was much valuable property destroyed or carried away, but all values, and especially the values of slave property, were greatly depreciated. The people of West Virginia were not responsible for this condition and they ought not to be prejudiced by it in ascertaining the relative values of the property in the two States at that date.

Paragraphs 3, 4, 5, and 6 read as follows:

> "3. All expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of the debt was contracted.
>
> "4. Such proportion of the ordinary expenses of the government of Virginia since any of said debt was contracted, as was properly assignable to the counties which were created into the State of West Virginia on the basis of the average total population of Virginia, with and without slaves, as shown by the census of the United States.
>
> "5. And also on the basis of the fair estimated valuation of the property, real and personal, by counties, of the State of Virginia.
>
> "6. All moneys paid into the treasury of the Commonwealth from the counties included within the State of West Virginia during the period prior to the admission of the latter State into the Union."

The defendant asks that these paragraphs be so modified as to read as follows:

> "3. All expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of said debt was contracted, *and prior to January 1, 1861.*
>
> "4. The ordinary expenses of the government of Virginia since any of said debt was contracted *and*

prior to January 1, 1861, on the basis of the average total population of Virginia, with and without slaves, as shown by the census of the United States.

"5. And also on the basis of the *assessed* valuation of the property, real and personal, by counties, of the State of Virginia during the same period.

"6. All moneys paid into the treasury of the Commonwealth from the counties included within the State of West Virginia, during the said period, *and prior to January 1, 1861*."

Unless some date is fixed by the court at which the investigation shall stop, the master will be required to decide what seems to us some very difficult questions. On the 17th of April, 1861, Virginia passed an ordinance of secession from the Union, and from that time on until long after West Virginia was admitted as a State the two sections were substantially as separate and distinct as they are now. Not long after the passage of the ordinance of secession the restored government of Virginia was organized, composed almost entirely of the counties now constituting the State of West Virginia. These counties paid nearly the whole of the revenue of the restored State until the admission of the new State into the Union. Is West Virginia to be charged in this proceeding with money expended in what is now her territory during that time, and with her just proportion of the ordinary expenses of the government up to June 30, 1863? That was the only recognized government existing in Virginia during that period. We do not suppose it will be claimed that West Virginia is liable for any part of the ordinary expenses of the government at Richmond after the passage of the secession ordinance. To make such a charge against her would be to compel her to contribute to the support of a government in rebellion against the United States. Under the Wheeling ordinance she ought to be charged with money expended in her counties and with her share of the ordinary expenses and credited with money paid into the State treasury during *the same period*, whatever that period may be; and it should be prescribed by the court, not left to the master.

Most of what we have said concerning paragraph 2 of the decree is also applicable to paragraph 5. It does not appear to us at all practicable to ascertain, by the testimony of witnesses, what was "the fair estimated valuation of the property, real and personal, by counties" forty-five years ago. According to the position taken by counsel for Virginia, the valuation is to be ascertained by considering the oil, gas, iron, coal, and timber separately from the land in or on which they were situated, and then, of course, it would be necessary to ascertain the value of the land separately, without the minerals or timber, in order to secure the entire valuation. This tedious process would have to be adopted in both States, if it was adopted in one, and the investigation would consequently be almost interminable. It is well known that Virginia had vast and valuable deposits of coal and iron and large forests of timber, as well as many other natural resources and advantages which West Virginia did not possess, such as navigable waters, access to tide water, with large bays and fine harbors. Are all these assets to be valued separately also, or did they, like the minerals and timber in West Virginia, affect the value of land and other property of the State and thereby increase the valuation in the official assessments?

The fact that assessments were not made annually, but only once in ten years, is not very material when they are introduced as evidence of values in any intermediate year. The United States census is taken only at the end of each decade, but each decennial census and each decennial assessment shows a certain rate of increase or decrease, as the case may be, since the last one was taken, and it is not difficult, therefore, to calculate with reasonable accuracy what the values are in any particular year. Such evidence is certainly far more reliable than the memories and opinions of witnesses who are called to testify after the lapse of nearly half a century.

In plaintiff's brief on this motion it is said:

> "The expenses of the government of the restored State government from June or July, 1861, to June 20, 1863, when the State of West Virginia was created, were all furnished from the funds of the Commonwealth of Virginia, as appears from the acts of the legislature referred to in the progress of this cause. So that the latter date would be the proper one, if any amendment at all is to be made."

On the 19th day of June, 1861, the convention which had assembled at Wheeling on the 8th of June, 1861, adopted an ordinance for the reorganization of the State government, and the restored State government was organized immediately thereafter by the election (by the convention) of a governor and other State officials. Senators were elected to the Congress of the United States on the 9th day of July, 1861, and they were admitted to seats in the Senate on the 13th day of the same month. This government continued until 1867, and it defrayed all its own expenses as long as it existed. As already stated, nearly the whole of its revenue was paid by the counties now composing the State of West Virginia until the admission of that State into the Union; the old Commonwealth of Virginia paid no part of the expenses. It had not only withdrawn protection from the persons and property of the people in West Virginia, but was waging war against them, having, as early as April 24, 1861, seven days after the passage of the ordinance of secession, entered into an agreement with the Confederate States transferring the control of the State to the Confederacy. We are not aware of the existence of any acts of the legislature showing that any part of the expenses of the restored State government was paid "from the funds of the Commonwealth of Virginia," unless the restored government is meant; and if this is the meaning of the statement, the people of West Virginia have paid once for the support of their government and for the protection of their territory and property, without any assistance from the old State, and that State ought not now to have any credit on account of these ordinary expenses.

We respectfully submit that, whatever date may be fixed with respect to the closing of the other accounts in controversy, it is clear that West Virginia should not be charged with any part of the ordinary expenses of the State government after the actual separation and the withdrawal of protection by Virginia in this respect.

W. G. CONLEY,
Attorney General.

J. G. CARLISLE,
JOHN C. SPOONER,
CHAS. E. HOGG,
W. MOLLOHAN,
GEO. W. MCCLINTIC,
W. G. MATHEWS,
Of Counsel for Defendant.

FILE COPY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

IN EQUITY. ORIGINAL, No. 4.

COMMONWEALTH OF VIRGINIA, COMPLAINANT,

against

WEST VIRGINIA, DEFENDANT.

MOTION TO MODIFY DECREE OF REFERENCE.

To the Honorable the Supreme Court of the United States:

Now comes the State of West Virginia, the defendant herein, and availing itself of the leave granted by the interlocutory decree heretofore entered in this cause, respectfully moves the court to modify the said decree to the end that the same may be more definite and certain in the particulars hereinafter set forth:

First. By amending paragraph two to read as follows:

> "The territorial area and assessed valuation of the States of Virginia and West Virginia June 20, 1863, and the population thereof, with and without slaves, separately stated, including in the latter State the counties of Berkeley and Jefferson."

Second. By adding at the end of paragraph three thereof the words:

> "Prior to January 1, 1861."

Third. By amending paragraph four so as to read as follows:

> "The ordinary expenses of the government of Virginia since any of said debt was contracted and prior

to January 1, 1861, on the basis of the a
population of Virginia, with and witho
shown by the census of the United States

Fourth. By amending paragraph five by stri
words "fair estimated" where they occur in th
and inserting in lieu thereof the word "assess
adding at the end thereof the words "during
period," so that the same will read:

"5. And also on the basis of the assess
of the property, real and personal, by cou
State of Virginia during the same period

Fifth. By amending paragraph six by insertin
word "period" in the second line thereof the wor
before the word "prior" in the third line there
"and," and by striking out the words "the adm
latter State into the Union" and inserting in
the words "January 1, 1861," so that it will read

"6. All moneys paid into the treasury
monwealth from the counties included
State of West Virginia during the said
prior to January 1, 1861."

Attorney

J. G. CARLISLE,
JOHN C. SPOONER,
CHAS. E. HOGG,
W. MOLLOHAN,
GEO. W. MCCLINTIC,
W. G. MATHEWS,
Of Counsel for Defendant.

[Endorsed:] Supreme Court of the United Sta
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